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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DARRICK B. LEIKER, U.S. AIR FORCE,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

AND OTHER CASES

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial duties for fixed terms?

LISTING OF PARTIES PURSUANT TO RULE 24.1(b)

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PETITION FOR A WRIT OF CERTIORARI [1]

The petitioners, Darrick B. Leiker, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), *cert. granted*, 61 U.S.L.W. 3783 (May 24, 1993), is reprinted as Appendix A at App. 1a. The un-

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* Full listing of parties to this proceeding appears on page ii.

[1] This petition incorporates essentially the same brief which was submitted by U.S. Navy counsel in *Weiss v. United States*, No. 92-1482, and by U.S. Army counsel in *Barkley v. United States*, No. 92-1646.

published decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at App. 85a.

The decision of the United States Court of Military Appeals in *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993), is reprinted as Appendix D at App. 88a. The unpublished decision of the United States Air Force Court of Military Review, in *United States v. Leiker*, ACM No. 28899, (A.F.C.M.R. 19 March 1992), is reprinted as Appendix E at App. 95a. The opinion of the United States Court of Military Appeals, *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993), is reprinted as Appendix C at App. 86a.

JURISDICTION

The decisions of the Court of Military Appeals were rendered between September 10, 1993 and September 30, 1993. The jurisdiction of the Court is invoked under 10 U.S.C.A. § 867a (Supp. 1993), 28 U.S.C.A. § 1259(3) (Supp. 1993), and *Freytag v. Commissioner*, 111 S.Ct. 2631, 2638-40 (1991).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Article 6, 16, 26 and 66, 10 U.S.C. §§ 806, 816, 826, and 866, are set forth in Appendix K, Pet. App. at 179a, Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984, is set forth in Appendix L, Pet. App. at 184a.

STATEMENT OF THE CASE

This is a consolidated petition representing interested service members of varying ranks from the Air Force, whose court-martial convictions were affirmed by the Court of Military Appeals between September 10, 1993 and September 30, 1993. In *United States v. Leiker*, 37 M.J. 418 (C.M.A. 1993), the judicial appointment and due process issues were expressly raised at the Court of Military Appeals. The Court of Military Review granted review of these issues, and rendered adverse summary dispositions in light of *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992) (Appendix A). In *United States v. Maxwell*, No. 68354/AF (C.M.A. September 28, 1993), petitioner Maxwell raised the due process issue at the Court of Military Appeals; however, that court refused to grant review on the issue in accordance with *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993) (Appendix C). Petitioner Maxwell and the remaining petitioners raise the judicial appointment issue pursuant to the jurisdictional statement herein, *infra* p. 2. Each case herein is factually distinct, and all raised other issues which are not the subject of this petition.[2]

Subsequent to the Court of Military Appeals' decision in *Weiss*, that Court acknowledged in *United States v.*

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[2] Where, in the appendices the individual orders of the Court of Military Appeals refer to a particular issue number, that issue represents the judicial appointment question.

Rice, 36 M.J. 264 (C.M.A. 1993) (Appendix C) that there were over 200 cases pending wherein the trial and appellate military judges were challenged because they were not appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2. In *Rice*, the Court of Military Appeals recognized the possibility of a grant of certiorari and relief by this Court, and, if so, afforded petitioners the opportunity for further relief. This petition adopts and incorporates the same argument as set forth in *Weiss, infra* (No. 92-1482).

Like *United States v. Weiss*, this petition raises two closely related questions which go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions. All military trial judges and almost all appellate military judges are commissioned officers and lawyers on active duty in their services. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges. Instead, military judges are selected and appointed by the Judge Advocate General of their service, who is the senior uniformed lawyer in each armed service in charge of all military legal personnel, and who is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice art. 6(a), 10 U.S.C. § 806(a) (1988). Moreover, the Judge Advocates General who appoint military judges have absolute and unreviewable discretion to remove or transfer them out of their judicial assignments, and those judges lack protection if their decisions do not suit their Judge Advocate General. Accordingly, the method of appointment to judicial service in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. ***Institutional Framework.***

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms. Uniform Code of Military Justice art. 142, 10 U.S.C.A. § 942 (West. Supp. 1992). The appointments and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are approximately 35 appellate military judges, who may be either military officers or civilians, all of whom are appointed by the Judge Advocate General of their service. In addition, for each service's Court of Military Review, where petitioners' cases were heard, the respective Judge Advocate General, or, the respective Assistant Judge Advocate General signs and submits the judges' annual fitness reports, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although these courts are permanent courts, located in the Washington, D.C. area, none of the judges is appointed to a fixed term of office. Uniform Code of Military Justice art. 66(a), 10 U.S.C. § 866(a) (1988). The Courts of Military Review are typically divided into three-member panels, each with their detailed rules to manage and regulate dockets and the attorneys who practice before them. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement of one year or more a dismissal, or a bad-conduct or dishonorable discharge is adjudged. Uniform Code of Military Justice art. 66(b), 10 U.S.C. § 866(b) (1988).

Military trial judges preside at special courts-martial and, if qualified, at general courts-martial.[3] Trial judges

[3] Currently, there are approximately 95 judges from all of the services who are certified to preside at general courts-martial.

must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, their selection and appointment as a judge is made by the Judge Advocate General of their service. Like appellate judges, the trial judges have no fixed terms of office. Uniform Code of Military Justice art. 26(a)-(c), 10 U.S.C. § 826(a)-(c) (1988). Military trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who in turn reports to and is supervised by the Chief Judge of the Trial Judiciary of the respective service.

Each armed force assigns military judges as and when it sees fit. Judges often serve a two-, three- or four-year assignment. However, a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force.[4]

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done—the sole requirement is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States,* 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or term of years, total forfeiture of pay and allowances, and/or a dishonorable or bad-conduct discharge (or dismissal for officers). 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States*

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[4] William H. Cook, *Courts-Martial: The Third System in American Criminal Law,* 1978 So. Ill. U. L. Rev. 1, 17-18; 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 14-31.00, at 518-19 (1991). The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls their actual duty assignments.

v. Ohrt, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh,* 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months of confinement, and/or forfeiture of up to two-thirds pay per month for six months, and/or a bad conduct discharge. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1988).

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf,* 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [the jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal Sentencing Guidelines. *See United States v. Brown,* 28 M.J. 470, 474 n.3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States,* 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole,* 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Uniform

Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1988).

2. *Rulings of the Court of Military Appeals.*

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioners' claims that the manner in which the trial and appellate military judges in their cases were appointed violated the Appointments Clause of the Constitution, and that failure to appoint those judges to fixed terms of office denied petitioners' liberty without due process. *See* Pet. App. 2a n.1. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).[5] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss' Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision.

In order to garner three votes, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. Pet. App. 5a. This proposition was endorsed by four of the court's five judges. Pet. App. 21a, 36a, 77a.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the

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[5] A petition for writ of *certiorari* in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the Due Process issue.

President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States,* 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968 and thus no new appointment was necessary. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" Pet. App. 8a.

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her opinion does not mention *Buckley v. Valeo,* 424 U.S. 1, 132 (1976) (per curiam), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. Additionally, Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position in both its brief (Brief at 10) and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption to the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a *"professional judiciary"* in the

military. Pet. App. 58a. (italics in original). He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of the entire Judge Advocate General's Corps from which military judges are chosen. Pet. App. 83a.

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C. area or for courts-martial like these that are held in peacetime.

REASONS FOR GRANTING THE WRIT

This petition, like *United States v. Weiss,* seeks to establish minimum standards for the appointment of military judges and their retention in office for a fixed term. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause, are available to those tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violation would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

I. THE APPOINTMENTS CLAUSE VIOLATION

> Not since *Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Pet. App. 72a (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner,* 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo,* 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is whether their appointment as military judges, after they have been duly appointed as military officers, must be made by one of the authorities set forth in the Appointments Clause.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).[6]

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[6] A predictable consequence of having appointments made by an intermediate official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is the homogeneity of the judges of the Courts of Military Review. Thus, the 35 current appellate judges include only two women and one African-American. The only two civilians sit on the five-member Coast Guard Court.

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied because all military judges are commissioned officers of the Armed Forces, having been nominated by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits—a Deputy Secretary of Defense could not simply move over to become the Assistant Attorney General for Antitrust or a Member of the Equal Employment Opportunity Commission—the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in 1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. Even if that assessment were correct, and petitioners agree with the dissenters that it is not, that would at most allow those who were in a judicial position in 1968—the "incumbent[s]" in *Shoemaker's* words (147 U.S. at 301) —to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers.

As a fall-back Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to persons who were already in offices to which they had been properly appointed. But there would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated

whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker*'s "germaneness" test. The duties and powers of military judges, including all of those involved in petitioners' cases, are so different from those of prosecutor, defense counsel, or legal advisor to a command—which is what most military lawyers do before they become military judges—that there is not simply an addition of a related duty, as in *Shoemaker*, but a substitution of a new job, with entirely new functions, for an old one. Surely, no one would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on that Court without meeting the requirements of the Appointments Clause; the result should be no different from any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the ruling below. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is decisive in determining whether the Appointments Clause applies at all, and under that analysis there can be no question that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very least, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision below rests on even shakier ground because the decisive vote was cast by Judge Crawford. She

implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale: that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the Armed Forces. Her ruling conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the Appointments Clause based on Congress's interest in, or plenary power over, particular subject areas. Judge Crawford's rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesole exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's ruling that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken the far more expansive route to affirming petitioner's convictions if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error—as it clearly seems to be—there were three votes to overturn petitioner's convictions, and it should be respondent, not petitioners seeking *certiorari*.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who practice in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, write the annual fitness reports of the members of each respective service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary

early retirement. Indeed, the Due Process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

The validity of the appointment of military judges under the Appointments Clause is a significant constitutional question which the Court should address immediately. The 2-1-2 division within the Court of Military Appeals attests to the serious debate on the merits of the issues. A split in the circuits is unlikely ever to arise, because the question has been fully and fairly litigated and resolved by the military justice system, thus potentially insulating it from review on habeas corpus. *See generally, Watson v. McCoffer*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). In any event, as it did in *Freytag*, this Court should grant review now to resolve the dispute as promptly as possible.

II. THE DUE PROCESS VIOLATION

The reasons this Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Noncompliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military trial and appellate judges, yet he is also responsible for supervising the efficient working of the service's military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the cor-

rectness of one of its prior decisions—*United States v. Raddatz*, 447 U.S. 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioners believe that respect for state legislative judgments and concerns of federalism, which loom so large in *Medina*, have no place where federal Due Process rights are at issue, but the uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard we also note that the concerns about overturning specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces, *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review, which sit permanently in the Washington, D.C. area. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility for involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals fell woefully short of justifying a massive exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and hear criminal appeals is an absolute minimum protection for the accused. The due process issue alone is sufficiently important to warrant plenary consideration by this Court, especially because the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

For the reasons stated, this Court should grant review in order to bring the military courts-martial system in line with accepted principles of American jurisprudence, and ensure that trials by court-martial are conducted in a fair and impartial manner.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,869
NMCM 89 4189

UNITED STATES,
Appellee,

v.

ERIC A WEISS,
Private U.S. Marine Corps,
Appellant.

Argued Oct. 6, 1992

Decided Dec. 21, 1992

For appellant: *Commander Philip D. Cave,* JAGC, USN (argued); *Captain Dwight H. Sullivan,* USMC and *Lieutenant Franklin J. Foil,* JAGC, USNR (on brief).

For appellee: *Lieutenant Commander Lawrence W. Muschamp,* JAGC USN (argued); *Colonel T.G. Hess,* USMC (on brief).

Amici Curiae on behalf of appellant: *Colonel Malcolm H. Squires, Lieutenant Colonel James H. Weise, Major James M. Heaton* (on brief)—For Defense Appellate Division, USA. *Robert B. Weintraub, Joan E. Goldberg, Todd Gaziano* (on brief)—For the Committee on Military Justice and Military Affairs, Association of the Bar of the City of New York.

Amici Curiae on behalf of appellee: *Thomas E. Booth* (argued); *Robert S. Mueller* (on brief)—For the United States Department of Justice. *Lieutenant Commander Charles J. Bennardini* (argued)—For Appellate Government Division, USCG. *Colonel Richard L. Purdon, Lieutenant Colonel Jeffery T. Infelise, Captain Jane M.E. Peterson* (on brief)—For Appellate Government Division, USAF. *Colonel Dayton M. Cramer, Major Joseph C. Swetnam, Captain Donna L. Bartlett, Captain Samuel J. Smith, Jr.* (on brief)—For Government Appellate Division, USA.

Opinion

GIERKE, Judge:

A military judge sitting as a special court-martial convicted appellant, consistent with his pleas, of stealing a racquetball glove from the base exchange, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 931. The approved sentence provides for a bad-conduct discharge, confinement and partial forfeitures for 3 months. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated January 31, 1992.

This Court granted review of the following issue: [1]

> WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF

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[1] We also granted review of the following issue:

> WHETHER THE COURT-MARTIAL WHICH TRIED THIS CASE HAD JURISDICTION WHERE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW HAD POWER TO REVIEW AND AFFIRM THIS CASE WHERE ITS JUDGES WERE NOT APPOINTED TO A FIXED TERM OF OFFICE.

This issue was resolved adversely to appellant in *United States v. Graf*, 35 MJ 450 (CMA 1992).

THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

Appellant argues that military judges must be nominated by the President and confirmed by the Senate as military judges. The Government argues that military judges already have been nominated and confirmed as military officers, that military officers traditionally have performed judicial duties, and that military officers need not receive an additional appointment to perform judicial duties. We hold that the Constitution does not require that a military officer who meets the qualifications of Article 26, UCMJ, 10 USC § 826, receive a second appointment to perform the duties of a military judge. Likewise, we hold that a military officer meeting the qualifications of Article 66, UCMJ, 10 USC § 866, need not receive a second appointment to perform the duties of an appellate military judge.

I. Appointment of Officers of the United States

Article II, § 2, para. 2, clause 2 of the Constitution—the Appointments Clause—provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The purpose of the Appointments Clause is twofold: (1) it protects the prerogative of the President from

congressional encroachment on his power to appoint his subordinates; and (2) "it limits the universe of eligible recipients of the power to appoint." *Freytag v. Commissioner of Internal Revenue,* 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991). Appellant argues that this second purpose, a limitation on the power to appoint, is violated by Articles 26 and 66 because they vest the appointment power in the Judge Advocate General rather than the President, the Courts of Law, or the head of a department.

The first question we must address is whether the Appointments Clause is applicable to the military justice system. Government counsel have not disputed this applicability of the Appointments Clause. Counsel for the United States Coast Guard, appearing as amicus curiae, argue that the Appointments Clause does not apply to the military justice system because that system is created pursuant to the plenary power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, and that the Supreme Court grants great deference to Congress in the exercise of that power. *See United States v. Kovac,* 36 MJ 521, 522-23 (CGCMR 1992); *United States v. Prive,* 35 MJ 569, 573-77 (CGCMR 1992).

We agree that "[j]udicial deference . . . is at its apogee" when the authority of Congress to govern the land and naval forces is challenged. *Solorio v. United States,* 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987). Nevertheless, congressional authority to raise, support, and govern the armed forces is separate from the authority to appoint Officers of the United States. Judicial deference is granted only to the former, a legislative power conferred by Article I of the Constitution. The appointment of Officers of the United States is an Executive power, conferred by Article II and controlled by the Appointments Clause, from which the

armed forces are not exempt, either expressly or by implication.

In *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court held that the plenary power of Congress over federal election practices did not exempt members of the Federal Election Commission from the Appointments Clause. The Supreme Court explained:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* Officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. at 132, 96 S.Ct. at 688. Thus, we are compelled to conclude that, while Congress may determine how the military justice system will operate, it may not exempt those who will operate it from the Appointments Clause. Accordingly, we hold that the Appointments Clause is applicable to the military justice system.

The next question is whether the duties imposed on military judges by Articles 26 and 66 must be performed by an Officer of the United States, as that term is used in the Appointments Clause. Appellant contends, and we agree, that judicial duties may be performed only by "Officers of the United States," appointed in a manner consistent with the Appointments Clause. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991) (special trial judges of Tax Court); *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931) (United States commissioners). *See also Buckley v. Valeo,* 424 U.S. at 126, 96 S.Ct. at 685

("[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed" in accordance with the Appointments Clause.).

All military trial judges and most appellate military judges are commissioned officers of their respective armed forces. Commissioned officers of the armed forces are "Officers of the United States." *See Wood v. United States,* 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883). All regular officers of the military services are appointed by the President and confirmed by the Senate. *See* 10 USC § 531; *see also* 14 USC §§ 211 and 212 regarding appointment of regular Coast Guard officers. Reserve officers above the grade of major/lieutenant commander are appointed by the President and confirmed by the Senate. *See* 10 USC §§ 593 and 5912. Active duty military officers are appointed and confirmed again upon each promotion to a grade above pay grade 0-3. *See* 10 USC § 624 (promotion of active-duty regular and reserve officers of the Army, Air Force, Navy, and Marine Corps).

If judicial duties may be performed only by Officers of the United States, and military officers are Officers of the United States, the next question is whether military officers may perform judicial duties without a new "judicial" appointment. In *Shoemaker v. United States,* 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court had occasion to consider the nature and scope of the office held by military officers. The Supreme Court held that two military officers, the Chief of Engineers and the Engineer Commissioner for the District of Columbia, did not require second appointments as members of a commission created by Congress to select land for Rock Creek Park in the District of Columbia, survey it, map it, and determine the just compensation to be paid by the United States upon its condemnation. Justice Shiras explained:

> As, however, the two persons whose eligibility is questioned were at the time of the passage of the act and of their action under it officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate.

He went on to define "germane" broadly, observing:

> It is true that it may be sometimes difficult to say whether a given duty, devolved by statute upon a named officer, has regard to the civil or military service of the United States. *Wales v. Whitney,* 114 U.S. 564, 569 [5 S.Ct. 1050, 1052, 29 L.Ed.277 (1885)]; *Smith v. Whitney,* 116 U.S. 167, 179, 181 [6 S.Ct. 570, 576, 577, 29 L.Ed. 601 (1886)]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391.

Appellant argues that "the offices already held by them" were the specific offices of Chief of Engineers and Engineer Commissioner for the District of Columbia, and not the underlying office of military officer. A careful reading of *Shoemaker* requires that we reject that argument for two reasons. First, *Shoemaker* specifically referred to "the duty which the *military officers* . . . were called upon to perform." (Emphasis added.) Second, the two cases cited in *Shoemaker* both dealt with the scope of military duties in general, not the specific duties of the positions held by the military officers. *Wales* addressed the question whether the medical duties of the Navy Surgeon General were "military" as opposed to "civil"

duties. *Smith* addressed the issue whether the fiscal duties of the Navy Paymaster-General were of a civil or military nature.

The principle we glean from *Shoemaker* is that Congress may create a new office (*e.g.*, Rock Creek Park Commissioner) and give a military officer the duties of that office without making a new appointment necessary, if the new duties are "germane" to the military duties of that officer. Applied to this case, it means that a second "judicial" appointment is not required if: (1) Congress did not create a new "office"; or (2) Congress created a new office, but the duties of that office are "germane" to the duties of the military officer detailed to perform them. A second appointment would be required if Congress created a new office and the duties of that office were not germane to the duties of the military officer detailed to perform them.

II. Military Judges

A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished. *See* Arts. 22, 23, and 24, UCMJ, 10 USC §§ 822, 823, and 824, respectively (prescribing who may convene courts-martial). Its constitutional origin is based on the congressional authority to govern the armed forces set out in Article 1, § 8, clause 14. As Colonel Winthrop explains, "Courts-martial of the United States, although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, are, unlike these, not a portion of the Judiciary of the United States, and are thus not included among the 'inferior' courts which Congress 'may from time to time ordain and establish.'" W. Winthrop, *Military Law and Precedents* 49 (2d ed. 1920 Reprint).

Military judges perform duties prescribed by statute and the executive order when detailed to a specific court-martial. *See* Art. 26; Exec. Order No. 12473, April 13,

1984, 49 Fed.Reg. 17,152 (promulgating the new Manual for Courts-Martial); RCM 801-1011, 1102, 1104, Manual for Courts-Martial, United States, 1984. Military judges have no inherent judicial authority separate from a court-martial to which they have been detailed. When they act, they do so as a court-martial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade and rank. To the extent that they perform judicial duties such as authorizing searches and reviewing pretrial confinement, their authority is not inherent but is either delegated or granted by executive order. *See* Mil.R.Evid 315(d)(2), Manual, *supra* (military judge may authorize searches *if* authorized by regulations of Secretary of Defense or Secretary concerned); RCM 305(g) (military judge may release from confinement); RCM 305(i)(2) and RCM 305(j) (military judge may review propriety of pretrial confinement).

To resolve the granted issue with respect to military judges, we must answer two questions: (1) Did Article 26 create a new office of "military judge"?; and (2) If so, are the duties of thhe new office germane to the duties of the military officer detailed as a military judge of a general court-martial or special court-martial?

A. New Office

After examining the history and evolution of the military judge, set out in greater detail below, we conclude that Congress did not create a new "office" when it enacted: the Articles of War (AW) in 1920 (requiring that a "law member" be detailed to every general court-martial—AW 8) or the Uniform Code of Military Justice of 1950 (requiring detail of a "law officer" to every general court-martial—Art. 26, 50 USC § 590); or the Uniform Code of Military Justice of 1968 (redesignating the law officer as the military judge—Art. 26, 10 USC § 826).

As the position of military judge has evolved, the military judge has acquired virtually all the duties previously performed by the president and members of a court-martial. Prior to the 1920 amendments to the Articles of War, the president of a court-martial, who usually was not a lawyer, presided over the trial. *See* para. 89, Manual for Courts-Martial, U.S. Army, 1917. In 1920, AW 8 was amended to require that a "law member" be detailed to general courts-martial in the Army. 41 Stat. 787, 788. AW 31 was amended in 1920 to transfer some duties of the president to the law member. It also provided that the law member ruled finally on questions of admissibility of evidence but could be overruled by a majority of the court members on other interlocutory questions. Until 1951, the Navy and Coast Guard continued the pre-1920 practice of using non-lawyers to preside over courts-martial and decide interlocutory questions. *See* §§ 381 and 370, Naval Courts and Boards, 1937; para. 385(t), Manual for Courts-Martial, U.S. Coast Guard, 1949 at 134.

When the Uniform Code of Military Justice, Pub.L. No. 81-506, 64 Stat. 108, codified in 50 USC §§ 551-736, recodified in 10 USC §§ 801-940 (1956), became effective in May 1951, the law member was redesignated as the law officer and additional duties were transferred from the president of the court to the law officer. All military services were required to "appoint" a law officer to general courts-martial. *See* Art. 26. Nonlawyers continued to preside over special courts-martial, Art. 51, UCMJ, 50 USC § 626, recodified in 10 USC § 851 (1956). This changed when the Military Justice Act of 1968, Pub.L. No. 90-632, § 2(9), 82 Stat. 1335, 1336, became effective in August 1969.

The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82

Stat. 1336. Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.[2] As the Supreme Court explained in *Shoemaker*, "It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed." 147 U.S. at 301, 13 S.Ct. at 391.

The Military Justice Act of 1968 also amended Article 16, UCMJ, 10 USC § 816, to authorize an accused to request trial by a court-martial composed of only a military judge. 82 Stat. 1335. When trying a case without members, the military judge sits as one-member court-martial. A one-member court-martial was not new to military justice. *See* Art. 16(3), UCMJ, 50 USC § 576 (1950), recodified in 10 USC § 816(3) (1956) (summary court-martial); AW 7 (1916) (summary court-martial); Art. 64(b), Articles for the Government of the Navy (AGN) (1909) (deck court). When sitting as a one-member general court-martial or special court-martial, the military judge's authority is derived from the court-martial to which he is detailed, not from his status as a military judge. His authority is limited to that of the court-martial to which he has been detailed, and he may act only with respect to the cases referred to that court-martial. We conclude that the amendment of Article 16 did not create a new office but merely altered the composition of general courts-martial and special courts-martial.

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[2] In *United States v. Graf, supra*, this Court said, in dicta, *id.* at 455, that Congress "created" the military judge and the Courts of Military Review by enacting the Military Justice Act of 1968. We did not intend this imprecise dicta to hold that Congress created a new "office" in 1969, when the Act became effective.

Contrary to a dissenter's assertion that this view demeans military judges at 260 (Wiss, J., dissenting), we believe that our opinion merely recognizes the awesome life-and-death authority traditionally entrusted to military officers.

Likewise, the amendment of Article 39(a), UCMJ, 10 USC § 839(a), effective in 1969, authorizing the military judge to hold sessions outside the presence of the members to dispose of interlocutory motions, arraign the accused, receive pleas, and dispose of other procedural matters not requiring the presence of the members, did not create a new office. The purpose and effect of Article 39(a) was to avoid wasting the time of the members by requiring them to sit idly by while the military judge disposed of legal and procedural issues. S.Rep. No. 1601, 90th Cong., 2d Sess. 10 (1968), U.S.Code Cong. & Admin. News 1968, 4501. Article 39(a) did not confer new duties on the military judge; it merely authorized him to discharge those duties without wasting the time of the court members.

Since a new office was not created by the Military Justice Act of 1968, a second "judicial" appointment was not necessary for military judges. Accordingly, we hold that the military judge in appellant's case was not appointed in violation of the Appointments Clause.

B. Germane Duties

Assuming, *arguendo,* that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer. *Shoemaker v. United States,* 147 U.S. 282, 13 S.Ct. 361. Just as the duties of a Rock Creek Park Commissioner were germane to the duties of a military engineer, presiding over courts-martial is clearly germane to the duties of a military lawyer. Accordingly, a new appointment would not be required even if a new office was created.

III. Appellate Military Judges

In order to resolve the granted issue with respect to appellate military judges, we must address three questions: (1) Did Congress create a new office?; (2) If Congress created a new office, are the duties of that office germane to the duties of the military officer detailed to perform them?; and (3) What is the significance of the provision in Article 66(a) authorizing civilian members on boards of review and their successors, the Courts of Military Review?

A. New Office.

Appellant contends that Congress established a new office by creating an intermediate appellate court for each service. We hold that a new office was created when boards of review were established.

Prior to 1920, there were no appellate military courts. Appellate review of courts-martial was accomplished by a hierarchy of reviewing, supervisory, and confirming authorities, all of whom were military commanders, cabinet officers, or the President. In 1920, the Articles of War, applicable only to the Army, were amended by enactment of AW 50½, which mandated: "The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department." The board of review was required to examine every record of trial involving a sentence which required "approval or confirmation by the President." Furthermore, "execution of any . . . sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary," required review by the board of review and the Judge Advocate General. If the Judge Advocate General disagreed with the decision of the board of review, the record would be transmitted to the Secretary of War for the action of the President. AW 50½. On the other hand, special courts-martial and summary courts-martial

were reviewed only by the officer appointing the court. AW 36 (1920). After the 1948 amendments of the Articles of War, effective February 1, 1949, certain Army and Air Force general court-martial cases were reviewed by a board of review, a Judicial Council composed of three general officers of the Judge Advocate General's Corps, and the Judge Advocate General. *See* AW 50 (1948).

Prior to 1951, a Navy general court-martial was reviewed by "the commander of the fleet or officer ordering the court." 53d AGN (1934). A summary court-martial (the counterpart of the modern special court-martial) was reviewed "by the officer ordering the court . . . and by his immediate superior in command." 32d AGN. A sentence "extending to the loss of life, or to the dismissal of a commissioned or warrant officer" required confirmation by the President. 53d AGN. A deck court (the counterpart to the modern summary court-martial) was reviewed by the officer who ordered it. AGN 64(d). Reviewing authorities were required to examine jurisdictional issues, the legal sufficiency of the pleadings, objections to evidence, and the legal sufficiency of the evidence. *See, e.g.*, § 472, Naval Courts and Boards, 1937.

Prior to 1951, a Coast Guard deck court was reviewed "by the officer ordering" it and then was forwarded to Coast Guard Headquarters, where it was "reviewed for legality . . . with the same force and effect as though an appeal had been taken." The Commandant of the Coast Guard was authorized to take whatever action "the interests of justice and equity may require." The accused had a "right to appeal to the Secretary of the Treasury from a decision of a deck court." Arts. 31 and 36, Manual for Courts-Martial, U.S. Coast Guard, 1949. All other courts-martial were reviewed by the Secretary of the Treasury, and the President in the case of dismissal of an officer. 14 USC § 564(d) (1949); Art. 140, Manual, USCG, *supra*. No Coast Guard court-martial could

impose a sentence exceeding a discharge, confinement for 5 years, forfeiture, and reduction. 14 USC § 564(b) and (c); *see* Art. 50, Manual, USCG, *supra.*

After the Uniform Code of Military Justice became effective in 1951, convening authorities in all services retained the authority and responsibility to review the record of trial for legal sufficiency. *See* Art. 64, 50 USC § 651, recodified in 10 USC § 864 (1956) ("[T]he convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact. . . .").

The 1950 Code made boards of review mandatory for the Navy, Marine Corps, and Coast Guard. They were already mandatory for the Army by virtue of AW 50½, enacted in 1920. This AW was made applicable to the Air Force by 62 Stat. 1014 (1948), codified in 5 USC § 627k (1948). Article 66(a) (1950) mandated:

> The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review, each composed of not less than three officers or civilians, each of whom shall be a member of the bar of a Federal court or of the highest court of a State of the United States.

Effective in 1969, Article 66(a) was revised to its present language, as follows:

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. . . . Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. . . .

Boards of Review were a new entity, created by Congress for the Army in 1920, the Air Force in 1948, and

the Naval services in 1951. For the first time, there was a level of formal appellate review beyond the officer who convened the general court-martial. Also, for the first time, a permanent military tribunal was established, as compared to courts-martial which are temporary entities. Article 66 vested no discretion in the Judge Advocates General; boards of review were mandatory. We are satisfied that Congress, acting indirectly through the Judge Advocates General, created a new office by establishing boards of review. *Cf. Dettinger v. United States,* 7 MJ 216 (CMA 1979) (Congress, acting through Judge Advocate General, created Court of Military Review).

Unlike the Court of Military Appeals, created in 1950 as an instrument of civilian oversight imposed upon the military services, the boards of review were intended as military tribunals constituted by competent military authority from within each service. The mandate to each Judge Advocate General to "constitute" boards of review was consistent with the traditional practice of vesting the authority and responsibility for constituting military tribunals in military officers and giving them the authority to appoint the members.

That Congress intended the boards of review to be tribunals of a different nature from the Court of Military Appeals is apparent both from the language of the statutes creating them and the legislative history. The statutes first creating the Court of Military Appeals used traditional language for creating a civilian Article I court: "There is hereby established a Court of Military Appeals. . . ." Art. 67(a)(1), 64 Stat. 129 (1950). In 1969 the provision was amended to read: "There is a United States Court of Military Appeals established under article I of the Constitution of the United States. . . ." Finally, in Article 141, 10 USC § 941 (1989) Congress described the Court's status as follows: "There is a court of record known as the United States Court of Military Appeals. The court is established under article I of the Constitution." This is virtually the identical

language used by Congress to create other Article I courts. *See* 26 USC § 7441 ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court."); 38 USC § 7251 ("There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Veterans Appeals."). The language creating the boards of review was substantially different: "The Judge Advocate General of each of the armed forces shall constitute in his office one or more boards of review. . . ." 50 USC § 653 (1950), recodified in 10 USC § 866 (1956).

This difference in language was not accidental. Indeed, in 1966, Senator Sam Ervin held hearings on a bill to establish a Court of Military Review in each service which would have been appointed by the service secretary and whose judges, both military and civilian, would have served for a fixed term of office. That bill used language similar to the organic statutes for the Court of Military Appeals, the Tax Court, and the Court of Veterans Appeals. It would have amended Article 66(a) to read: "There is established for each military department an appellate court. . . . Each such court is a court of record and shall be known as the Court of Military Review for the military department for which it is established." Joint Hearings before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. and the Special Subcomm. of the Senate Armed Services Comm., 89th Cong., 2d Sess. 497-98 (1966). The bill was not enacted. Two years later, Article 66(a) in its present form was enacted.

The Senate Hearings on the 1950 Code reveal the intent of the drafters to use military expertise on the boards of review. The following exchange between Senator Kefauver and Professor Morgan is instructive:

> SENATOR KEFAUVER. . . . May I ask at this point, was there any difference of opinion on the part of the committee or extensive discussion as to whether each service should have its own reviewing section?
>
> MR. MORGAN. No; the committee was unanimous on that, so far as the board of review is concerned.

The notion was that each service would know more about the customs of the service, and all that sort of thing, and that the Judge Advocate General of that particular service would be the man that would be most competent to handle that thing from the point of view of this board of review, because the board of review, now, has very extensive powers.

Hearings on S.857 and H.R. 4080 Before a Subcomm. of the Senate Armed Services Comm., 81st Cong., 1st Sess. 42 (1949).

The amendments enacted in 1968 to Article 66(a) did not change the character or authority of the boards of review but merely completed the evolution by calling them what they were: appellate courts composed of appellate military judges. The legislative history of the 1968 amendment reflects that the redesignation of boards of review as a Court of Military Review was only a name change, designed to enhance the stature of the board of review by calling it a court and calling its members judges. This change was consistent with redesignating law officers as military judges. *See* S.Rep. No. 1601, 90th Cong., 2d Sess. 3, 14 (1968); The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975 at 247 (U.S. Gov't Printing Office). Certain organizational changes were mandated to improve efficiency and protect the independence of appellate military judges; but no new authority was conferred, no new duties imposed, and no new appointment procedures for appellate military judges were established.

B. Germane Duties

Turning the second question, we observe that military officers traditionally have been responsible for legal review of court-martial convictions in their capacities as reviewing and supervisory authorities. Prior to the creation of boards of review, military commanders were responsible for the legal review of courts-martial convened by them or their subordinates. *See* 53d AGN (1934) (record reviewed by "commander of the fleet or officer ordering the court"); 32d AGN (1934) (summary court-martial reviewed by "officer ordering the court" and "his immediate superior in command"); AW 46 and 47 (1920) (record reviewed by convening authority); para. 35, Manual for Courts-Martial, U.S. Coast Guard, 1949 (deck court reviewed by Commandant of Coast Guard); § 472, Naval Courts and Boards, 1937 (commander reviewing the record must examine jurisdictional issues, legal sufficiency of pleadings, objections to evidence, and legal sufficiency of evidence).

A cadre of legally trained officers existed in each of the services prior to 1920. The language of Article of War 50½ and Article 66 of the Code reflect that Congress had this cadre of legally trained officers in mind when boards of review were first created in 1920 and extended to all the services in 1951. Congress considered the duties of the boards of review not only germane to military duties, but particularly appropriate for military lawyers. We hold that the duties of the newly-created boards of review were "germane" to the duties of the legally trained military officers contemplated by AW 50½ and Article 66 of the Code; therefore, we hold that a second judicial appointment is unnecessary.

C. Civilian Members

Turning finally to the significance of the provision for civilian members, the legislative history of Article 66(a) reflects that the historical antecedent of the boards of review created by Article 66(a) was the Army board of

review, composed of military officers, which was created by AW 50½. The provision for civilian members was not included in AW 50½, but was added to Article 66(a) at the request of the Coast Guard. During the 1949 hearings on the proposed Uniform Code of Military Justice, Mr. Larkin explained the provision for civilian members as follows:

> Well, they were included initially at the request of the Coast Guard—not that it be worded this specific way but the Coast Guard does have civilian lawyers working in their court-martial procedures during peacetime, and they feel they are very competent.
>
> They don't have an unusually large number of officers in their review, and they wanted to be free if they desired to appoint a civilian lawyer working for the Coast Guard to a board of review. This was the easiest way to make that provision.

Hearings on H.R. 2498 before a Subcomm. of the House Armed Services Comm., 81st Cong. 1st Sess. 1189 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

In appellant's case we need not decide whether Congress inadvertently exceeded its authority by vesting the powers of an "Officer of the United States" in civilians who had not been appointed in accordance with the Appointments Clause, because no civilians participated in the appellate review of his case. We regard the provision for civilian members of boards of review and their successors, the Courts of Military Review, as severable from the remainder of Article 66(a). Congress had two purposes in enacting Article 66(a). The primary purpose was to make boards of review mandatory for all services. The secondary purpose was to accommodate the Coast Guard by authorizing civilian members on boards of review. Where a statute attempts to accomplish two or more objects, it may be valid as to one and

invalid as to others, as long as its purpose can be accomplished by the valid part and is not dependent upon or conditioned by the invalid part. *Sutherland Stat. Const.* § 44.07 at 503.04 (4th Ed.1986 Revision).

D. Conclusion

Applying the *Shoemaker* analysis to appellant's case, we hold that appellate military judges need not be reappointed to perform judicial duties because judicial duties are "germane" to the offices already held by them as legally trained commissioned officers of their respective armed forces. Accordingly, we hold that appointment of the appellate military judges who reviewed appellant's case was consistent with the Appointments Clause.

We have not addressed the desirability of a legislative requirement that trial and appellate military judges be specifically appointed as judges by the President, a Court of Law, or the Head of a Department, and we consider it inappropriate to do so. Congress has the power to require a second "judicial" appointment if considered desirable. Congress considered such a measure in 1966 but did not enact it. We decide only that a second "judicial" appointment was not constitutionally required for the trial and appellate judges involved in appellant's case. As we stated in *United States v. Henderson,* 34 MJ 174, 178 (CMA 1992), "As a court . . . we are not involved in the merits of . . . policy. We interpret statutes, and we can strike them down only when they violate the Constitution."

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judge COX concurs.

CRAWFORD, Judge (concurring in the result):

The lead opinion has put forward a thoughtful and well-reasoned analysis of how Article II, section 2, paragraph 2, clause 2, of the United States Constitution is not violated by the present manner of selecting military judges. However, I part ways with the underlying premise of the lead opinion that the Appointments Clause applies to the selection of a military judiciary and therefore can only concur in the result.

In concluding that the Appointments Clause does not apply either to selection of military trial or military appellate judges, one of necessity must engage in both an historical and a contemporary analysis of the Constitution and its Appointments Clause. In applying both approaches, the intentions of the Framers can be determined from documents that are available. *See, e.g.,* 4 P. Kurland & R. Lerner, *The Founders' Constitution* (hereafter Kurland) (1987); J. Harris, *The Advice and Consent of the Senate* (hereafter Harris) 25-30 (1953).

A. The Historical Approach

At the time of the Constitutional Convention in Philadelphia from late May to mid-September 1787, no thought was given to how the Appointments Clause should be applied to military trial and appellate judges. Kurland, *supra* at 28-38. Two major themes dominated the debates which shaped the Appointments Clause. First, those who opposed a strong executive resisted giving the chief executive the nomination authority over the national judiciary without some sort of Council to screen the appointment process. Second, those who opposed a strong legislature feared that if the appointment authority was given to the legislative branch, the appointment of a national judiciary would fall into the hands of certain factions. Harris, *supra* at 25-30.

At the time of these debates there was no military judiciary in place, that function being served by military

officers. There was, however, a great deal of debate and attention paid to a federal civilian judiciary as evidenced by Alexander Hamilton's discussions in *The Federalist Papers*, Nos. 78 through 83.[1] Thus, historically, the Founding Fathers gave no explicit consideration to including a military judiciary within the ambit of the Appointments Clause.

B. The Contemporary Approach

A contemporay approach to reviewing our Constitution and its provisions looks at the intent of the Framers and the interests and values they meant to protect.

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[1] No. 78, "A VIEW OF THE CONSTITUTION OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TENURE OF GOOD BEHAVIOR," wherein Hamilton discusses "the doctrine of judicial review," stating: "Whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."

No. 79, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE PROVISIONS FOR THE SUPPORT AND RESPONSIBILITY OF THE JUDGES," wherein Hamilton expresses "[t]houghts on the salary, tenure, accountability, and age of judges."

No. 80, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE EXTENT OF ITS POWERS," wherein "Hamilton traces the outlines of the judicial power."

No. 81, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE DISTRIBUTION OF ITS AUTHORITY," wherein Hamilton "states the case for a distinct, learned, independent Supreme Court, then speculates on the relations of the Supreme Court to the lower courts."

No. 82, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN REFERENCE TO SOME MISCELLANEOUS QUESTIONS," wherein Hamilton discusses "the relations of the federal and State courts."

No. 83, "A FURTHER VIEW OF THE JUDICIAL DEPARTMENT IN RELATION TO THE TRIAL BY JURY," wherein "Hamilton attempts . . . to quiet the fears of" some with a discussion "of this ancient 'palladium of free government.'"

The Federalist Papers, xxx-xxxi (A. Hamilton, J. Madison, J. Jay) (C. Rossiter 1961).

A contemporary reading of the Constitution is important because as John Marshall stated: "[I]t is a constitution we are expounding." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). The Constitution is a living document and "states or ought to state not rules for the passing hour, but principles for an expanding future," B. Cardozo, *The Nature of the Judicial Process* 83 (Yale Univ. Press 1921), and "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems v. United States,* 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910).

Utilizing a contemporary analysis I start by asking what interests and values were meant to be protected by the Appointments Clause. It is undisputed that the Appointments Clause was designed as a series of checks and balances between the Executive and Legislative Branches on the creation and filling of offices. Kurland, *supra,* 424 U.S. at 33. The Framers were concerned with a division of power to prevent one branch from becoming more powerful than the other.

The debates among the Framers over appointments authority in general and judicial appointments in particular bear out their desire for checks and balances as well as for qualified appointees. Edmund Randolph of Virginia argued that if appointment authority was in the legislative branch, this "generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." Whereas George Mason, also of Virginia, argued that, if the appointment to the judiciary was with the executive, it was "a dangerous prerogative. It might even give him an influence over the Judiciary department itself." *Id.* at 33.

Alexander Hamilton of New York thought that giving the Senate approval authority over nominations would be a check on the "spirit of favoritism of the President" and would work against the appointment of unqualified

individuals or individuals selected because of a family connection or personal attachment. Harris, *supra* at 28. Hamilton argued that to empower the legislature with appointment authority would just lead to "intrigue and cabal." *Id. Cf. Kurland, supra* at 31. Nathaniel J. Ghorum (also spelled Gorham in some texts) of Massachusetts thought it best that the Executive be responsible for appointment because "he will be careful to look through all the States for proper characters." *Id.* at 31. To prevent dependency on a single individual making the appointment, some Framers thought it best to have the Senate vote on the appointments. Others were concerned that a Senate vote would mean too "much fettering [in] the Senate." *Id.* at 32. Eventually the Framers settled on appointments by the executive with the advice and consent of the Senate.

In defense of the appointment power enunciated in the Constitution, Alexander Hamilton in *The Federalist* No. 66 commented as follows on how the appointment power would work:

> It will be the office of the president to *nominate*. and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, he may have made. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favourite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the senate would feel any other complacency towards the object of an appointment, than such, as the appear-

> ances of merit, might inspire, and the proofs of the want of it, destroy.

The Federalist: A Collection of Essays Written in Favour of The New Constitution, vol. II at 218-19 (J. and A. McLean, New York, 1788) (hereafter cited as McLean).

Thus the interests and values of providing for the selection of officers, including judicial officers, based on merit and dividing power between the executive and legislative branches gave birth to the Appointments Clause. The question remains whether, in order to protect those interests and values, it is necessary to select military trial and appellate judges pursuant to the Appointments Clause. In order to answer that question we must also examine the additional interests and values unique to national security and military matters which the Framers sought to protect. In so doing we can determine whether these other factors justify treating the military judiciary different from the federal civilian judiciary and thereby render the Appointments Clause inapplicable to military judges.

C. Analysis

Because of national security interests and concerns for unforeseen military exigencies, it was the intent of the Framers to vest great authority over these matters in Congress. L. Tribe, *American Constitutional Law* 353-56 (2d ed. 1988). They accomplished this in the Constitution through the enumerated powers of Article I, Section 8, Clauses 11 through 16 and 18. Under the enumerated powers, Congress has the power to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14); and "make all laws that are . . . . necessary and proper" (cl. 18).

The rationale for this approach by the Framers is found in Alexander Hamilton's *Federalist* No. 23:

> The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.*[*] The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense.
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> * * * *
>
> Whether there ought to be a federal government intrusted with the care of the common defence is a question, in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be cloathed with all the powers requisite to the complete execution of its trust. And unless it can be shewn, that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defense and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the *formation, direction* or *support* of the NATIONAL FORCES.

McLean, *supra,* vol. I at 144-45 (some emphasis [*] added).

This view was underscored by James Madison in *The Federalist* No. 41:

> But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?
>
> The answer to these questions has been too far anticipated, in another place, to admit an extensive discussion of them in this place. The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence? If a federal Constitution could chain the ambition, or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety.

McLean, *supra,* vol. II at 39.

Yet the Framers, mindful of the new nation's fears regarding establishment of a standing armed force in peacetime, S. Padover, *To Secure These Blessings* 203-08 (1962), did not propose to give the new executive and legislature this great authority without some limitation. Article I, Section 8, Clause 12, gives Congress the authority to "raise and support Armies" but also provides that "no Appropriation of Money to that Use shall be for a longer Term than two Years." In *The Federalist* No. 26, Alexander Hamilton puts forth a spirited defense of this clause that limits appropriations for military purposes to two Years:

> The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propreity of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter,

> by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence. As the spirit of party, in different degrees, must be expected to infect all political bodies, there will be no doubt persons in the national legislature willing enough to arraign the measures and criminate the views of the majority. The provision for the support of a military force will always be a favourable topic for declamation. As often the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition: And if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against incroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.

McLean *supra,* vol. I at 165-66.

An examination of the military judiciary, although similar to its civilian counterpart in the importance and scope of its duties, also reveals marked dissimilarities from a civilian judiciary because of the ever-existent potential for military exigencies. "Military exigencies" is not a term of art; our armed forces are not a garrison force. In the past 4 years alone, our military men and women have deployed to Panama in Operation Just Cause

and to Southwest Asia in Operations Desert Shield and Desert Storm. In addition, they have participated in the humanitarian mission to aid Kurdish refugees, Operation Provide Comfort, following Operation Desert Storm. Even as this opinion is being released, our troops are serving in Somalia as part of a relief effort called Operation Restore Hope.

These missions require worldwide deployment and the need for instant mobility and flexibility in assignments, including military judge assignments. Military judges must try cases in combat environments, and, due to the potential for military judge casualties, replacements must be available at a moment's notice. The ever-expanding role of the military only underscores the wisdom of our Founding Fathers in entrusting Congress with the authority and responsibility for providing for its day-to-day operations.[2]

In carrying out its enumerated responsibilities Congress has paid careful attention to the military justice system. Starting in 1950 with the adoption of the Uniform Code of Military Justice, Congress has been very active in expanding the status and power of the military judge. In 1950, Congress provided for the law officer who was the forerunner of the military trial judge. *See* Pub.L. No. 81-506, 64 Stat. 117. In the Military Justice Act of 1968, Pub.L. No. 90-632, 82 Stat. 1335, Congress provided for military judges (at 1336) and the Courts of Military Review (at 1341). *See generally* Cox, *The Army, The Courts, and The Constitution: The Evolution of Military Justice,* 118 Mil.L.Rev. 1 (1987);

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[2] For example if during Desert Shield/Storm a scud missile hit a barracks housing one or more judges from the services, replacements would be needed immediately. A service Judge Advocate General looking for qualified individual might select an individual from the Court of Military Review. Likewise, if there was a heavy case load before the Court of Military Review, for example, a series of classified cases, the Judge Advocate General should have the flexibility of assigning a trial judge not involved with those cases to theh appellate court.

Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge,* The Army Lawyer 23 (Dept. of the Army Pamphlet 27-50-239, October 1992).

In addition to his or her constitutional role as Commander-in-Chief, U.S. Const. art. II, § 2, the President has a specific role for military justice matters. Pursuant to its authority under the Constitution, Congress, through Article 36(a), Uniform Code of Military Justice, 10 USC § 836(a) (1979), has given the President the authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for . . . [trials by] courts-martial." Based on this delegation of authority from Congress, the President has by Executive Order set forth many rules in the Manual for Courts-Martial, United States, 1984, that pertain to the authority of the military judge. *See generally* 1 F. Gilligan and F. Lederer, *Court-Martial Procedure* 514-56 (1991).

In fulfilling its responsibilities, Congress has been mindful of the interests sought to be protected by the Appointments Clause. First, with respect to selection of qualified individuals to serve as military judges, Congress has determined that these assignments be made by the Judge Advocate General of each service who has direct responsibility for military justice within his or her respective service.[3] Congress has implicitly recognized

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[3] Article 26(c), Uniform Code of Military Justice, 10 USC § 826(c), provides: "The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member. . . ."

Article 66(a), UCMJ, 10 USC § 866(a), provides: "Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges."

See also Morgan, *The Background of the Uniform Code of Military Justice,* 6 Vand.L.Rev. 169 (1953); Comments, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice,* 29 Tex.L.Rev. 651 (1951).

that the Judge Advocates General are uniquely situated to determine which officers are best qualified within their respective services to serve as both trial and appellate judges. Moreover, these same individuals have by necessity great flexibility to make these assignments[4] quickly in a combat environment where casualties or other exigencies may affect the military judiciary.

Second, with respect to establishing a system of checks and balances between the Executive and Legislative branches, it is difficult to see how the present system of assigning military judges jeopardizes that delicate balance. If anything, the creation by Congress in 1951 of the United States Court of Military Appeals, a federal civilian court subject to the Appointments Clause, which reviews decisions of the military judiciary, more than satisfies any concerns in that regard. *See* 64 Stat. 129. Additionally, effective August 1, 1984, Congress provided in Article 67(h)(1), UCMJ, 10 USC § 867(h)(1), now Article 67a, UCMJ, 10 USC § 867a (1989), that decisions of our Court are reviewable by the Supreme Court of the United States by writ of certiorari, Military Justice Act, Pub.L. No. 98-209, § 10(c)(2), 97 Stat. 1393, 1406, thereby providing the ultimate check on judicial decisions of the military justice system.

If there is dissatisfaction with the military justice system as it exists today, it can be changed or modified by the majoritarian process. That is, the elected representatives of Congress, in consultation with the Execu-

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[4] Article 6(a), UCMJ, 10 USC § 806(a), states:

The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

tive branch, have the power to make any necessary changes. But this Court must not, by judicial fiat, impose the procedures intended for a federal civilian judiciary upon the military under the guise of the Constitution. To do so would be to ignore the constitutional deference given to Congress by our Founding Fathers because of the realities and practicalities of national security exigencies.

D. Special Deference

Based on the intent of the Framers, the Constitution, and Federal statute, the Supreme Court has given great deference to the authority of Congress and the President in military matters. The Supreme Court has repeatedly recognized the power of Congress to provide for military justice. Judge Grace in *United States v. Prive*, 35 MJ 569, 573-74 (CGCMR 1992), has listed some of those decisions as follows:

Dynes v. Hoover, 61 U.S. (20 How.) 65, 79, 15 L.Ed. 838 (1858) ("These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations. . . .").

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123, 18 L.Ed. 281 (1866) ("Congress has declared the kinds of trial [for offenses by soldiers] and the manner in which they shall be conducted. . . .").

Parker v. Levy, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . [T]he military has, again by necessity, developed laws and traditions of its own during its long history.")

Schlesinger v. Councilman, 420 U.S. 738, 757, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591, 609 (1975) ("The laws and traditions governing [military] discipline have a long

history; . . . they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.")

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66, 102 S.Ct. 2858, 2869, 73 L.Ed.2d 598 (1982) ("[T]he exercise by Congress and the Executive of the power to establish and administer courts-martial . . . involves a constitutional grant of power that has been historically understood as giving the political Branches of Government extraordinary control over the precise subject matter at issue.")

In *United States v. Prive, supra* 35 M.J. at 576, Judge Grace summarized the effect of these decisions on the present issue by paraphrasing a statement from *Northern Pipeline* as follows:

> [T]hese precedents [of the Supreme Court] "represent no broad departure from the constitutional command that" *appointments must be made in accordance with the Appointments Clause.* Rather, they reduce to a narrow situation not subject to that command, that "recogniz[es] a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of power" *to designate military judges outside of the provisions of the Appointments Clause "was consistent with, rather than threatening to, the constitutional mandate of separation of powers."*

See 458 U.S. at 64, 102 S.Ct. at 2868 (emphasis added).

Judge Grace also relied on this statement from *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 2931, 97 L.Ed.2d 364 (1987):

> Decisions of this Court after *O'Callahan* [*v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)] have also emphasized that *Congress*

> *has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.* As we recently reiterated, "[j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.' "

(Emphasis added and citations omitted.)

I agree with the Coast Guard Court of Military Review and "conclude that Congress, in legislating for the land and naval forces, may provide for the designation of judges within the military justice system in a manner not provided for in the Appointments Clause of the Constitution." 35 MJ at 577.

SULLIVAN, Chief Judge (dissenting):

I respectfully disagree with the lead opinion and Judge Crawford's separate opinion in this case. In my view the Constitution speaks clearly on the granted issue, and we are duty-bound to follow its supreme command. U.S. Const. art. VI. Military judges, both trial and appellate, are "inferior Officers" of the United States and must be appointed to their offices by "the President alone," or by this Court or one of the other "Courts of Law," or by the Secretary of Defense or one of the other "Heads of Departments." Art. II, § 2, para. 2, cl. 2. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Appellant's military judges were not so appointed, but their status as *de facto* appointees might preclude reversal of his conviction. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982); *Buckley v. Valeo*, 424 U.S. 1, 142-43, 96 S.Ct. 612, 693, 46 L.Ed.2d 659 (1976). Nevertheless, I must dissent to the majority's simple affirmance of this case. *Id.*

More particularly, I do not believe that Congress' broad power to make rules for the land and naval forces under Article I, § 8, clause 14 of the Constitution is unlimited such that the Appointments Clause can be considered *per se* inapplicable to military justice legislation. *See generally Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 660, 102 L.Ed.2d 714 (1989). (Even Congress' primary duty to make laws is limited by the constitutional prohibition against an ex post facto Law—*e.g.*, Art. I, § 9, para. 3). A contrary opinion in my view is extremely dangerous in that it upsets the delicate system of checks and balances provided in our Constitution to ensure the American way of government.

I also would hold that commissioning and promoting military officers by the President by and with the advice and consent of the Senate does not obviate the need for

additional constitutional appointments of such persons for higher or more responsible offices both within and without the military department (*i.e.*, military trial judge or appellate judge). There is no blanket "commissioned officer" exception to the Appointments Clause written in the Constitution, and the decision of the Supreme Court in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), should not be broadly extended to create one for military officers who are simply "legally trained." In sum, consistent with my judicial philosophy of spurning judicial legislation, I also must reject the judicial constitution-making accomplished by the lead opinion in this case.

I

The Granted Issue

The issue raised by appellate defense counsel and granted review by this Court is as follows:

> WHETHER APPELLANT'S COURT-MARTIAL LACKED JURISDICTION WHERE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION, AND WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW WAS WITHOUT POWER TO REVIEW THIS CASE WHERE ITS JUDGES WERE DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUION.

In this regard, I note that the judge in this trial was Major Edward F. Pesik, Jr., United States Marine Corps. He was certified in accordance with Article 26(b), Uniform Code of Military Justice, 10 USC § 826(b); sworn in accordance with Article 42(a), UCMJ, 10 USC § 842 (a); and detailed to this case.[1] The appellate military

[1] Appelleant represents without opposition that Major Pesik was a "General Court-Martial qualified" judge and the Sierra Judicial Circuit's Chief Military Judge.

judges in this case were Senior Judge James A. Freyer, a Navy Captain; Senior Judge Richard A. Strickland, a Marine Colonel; and Judge James E. Orr, a Navy Captain. These judges constituted Panel No. 1 of the Court of Military Review, and they reviewed appellate's case in accordance with that court's internal rules.

The issue of law raised by appellate defense counsel and granted by this Court focuses on the "designat[ion]" of the military judge who tried his case and the "designat[ion]" of the military appellate judges who heard his appeal. Appellant does not contend that these designations were accomplished in violation of the Uniform Code of Military Justice. Instead, he contends that they were not accomplished in accordance with the Appointments Clause of the United States Constitution. Art. II, § 2, para. 2, cl. 2. Relying heavily on the recent Supreme Court decision in *Freytag v. C.I.R., supra*, he asserts that military judges "are 'Officers of the United States' " who must be "appointed as such by the President, the Courts of Law, or the Head of a Department." Final Brief at 10. Finally, he asserts that the designation of these military judges by the Judge Advocate General of the Navy fails to satisfy this constitutional appointment standard.

II

The Statutes Establishing The Military Judge

A necessary step in resolving the granted issue is to understand the statutes which create the military trial and appellate judges and provide for persons to fill these judicial positions. At the outset I note that Congress has not expressly provided that a person be "appointed" a military trial judge or appellate judge. However, in the version of the Uniform Code of Military Justice enacted in 1950, Congress did provide for "appoint[ment]" of a law officer, the statutory predecessor of the military judge, by appropriate convening authorities. *See* Art. 26(a), UCMJ, 50 USC § 590(a), recodified in 10 USC

§ 826(a) (1956). Furthermore, in the 1950 Code, Congress provided for "appoint[ment]" of judges of this Court "by the President, by and with the advice and consent of the Senate." Art. 67(a), UCMJ, 50 USC § 654(a), recodified in 10 USC § 867(a) (1956); *see* Art. 152(b)(1), USMJ, 10 USC § 942(b)(1) (1989). Despite Congress' obvious familiarity with the appointment terminology, it chose to create the military judge and provide for filling this government position with somewhat less direct language.[2]

I first note that, since 1969, Article 26(b) had provided that "[a] military judge shall be a commissioned officer of the armed forces." 10 USC § 531 further provides:

> **§ 531. Original appointments of commissioned officers**
>
> (a) *Original appointments in the grades* of second lieutenant through colonel in the Regular Army, Regular Air Force, and Regular Marine Corps and in the grades of ensign through captain in the Regular Navy *shall be made by the President, by and with the advice and consent of the Senate.*

(Emphasis added.) *See also* 10 USC § 593 (appointment in reserves in commissioned grades below lieutenant colonel and commander by President alone).

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[2] What is an "appointment" for purposes of the Appointments Clause in a substantial constitutional question concerning separation of powers which implicates all three branches of our Government. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155, 2 L.Ed. 60 (1803). *See generally Buckley v. Valeo*, 424 U.S. 1, 122-24, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Moreover, in *Auffmordt v. Hedden*, 137 U.S. 310, 327, 11 S.Ct. 103, 108, 34 L.Ed. 674 (1890), the Supreme Court clearly held that Congress' use of the word "select" rather than "appoint" was but one factor to be considered in determining whether the Appointments Clause applied. Finally, in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the Supreme Court impliedly held that designation of officers for additional duty requires compliance in some manner with the Appointments Clause.

The qualifications for original appointment are also statutorily established:

> **§ 532. Qualifications for original appointment as a commissioned officer**
>
> (a) Under regulations prescribed by the Secretary of Defense, an original appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be given only to a person who—
>
> (1) is a citizen of the United States;
>
> (2) is able to complete 20 years of active commissioned service before his fifty-fifth birthday;
>
> (3) is of good moral character;
>
> (4) is physically qualified for active service; and
>
> (5) has such other special qualifications as the Secretary of the military department concerned may prescribe by regulation.

Article 26(b) (1969) also provides that a military judge must be "a member of the bar of a Federal court or a member of the bar of the highest court of a State." This requirement for legal training is somewhat less stringent than the requirement for detail as trial counsel or defense counsel at a general court-martial. *See* Art. 27(b), UCMJ, 10 USC § 827(b), which states:

> (b) Trial counsel or defense counsel detailed for a general court-martial—
>
> (1) must be a *judge advocate who is a graduate of an accredited law school* or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and
>
> (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(Emphasis added.)

I next note that Article 26(b) (1969) provides that a military judge must be "certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member." The standards for certification are not provided by statute, and there is no statutory requirement that a military judge be designated a member of the Judge Advocate General's Corps or a Marine Corps judge advocate. However, as a practical matter, military judges to be certified as qualified normally would have experience as a trial or defense counsel under Article 27(b). This statute alternatively requires designation as a "judge advocate."

In fact, the military judge who presided over this court-martial was a Marine judge advocate. *See* NAVMC P-1005, Officers on Active Duty in the Marine Corps at 1-43 (1 Oct.1989, 48th Rev.). 10 USC § 5587a provides:

> **§ 5587a. Regular Marine Corps: judge advocates**
>
> *With the approval of the Secretary of the Navy,* any regular officer on the active-duty list of the Marine Corps who is qualified under section 827(b) of this title *may, upon his application, be designated as a judge advocate.*

(Emphasis added.)

Moreover, two of the appellate military judges who heard his appeal before the Court of Military Review were members of the Navy Judge Advocate General's Corps. 10 USC § 5150 provides:

> **§ 5150. Staff corps of the Navy**
>
> (a) *The staff corps of the Navy are—*
>
> (1) the Medical Corps;
>
> (2) the Dental Corps;

(3) *the Judge Advocate General's Corps*;

(4) the Chaplain Corps; and

(5) such other staff corps as may be established by the Secretary of the Navy under subsection (b).

(b)(1) The Secretary of the Navy may establish staff corps of the Navy in addition to the Medical Corps, the Dental Corps, the Judge Advocate General's Corps, and the Chaplain Corps. *The Secretary may designate commissioned officers in, and may assign members to, any such staff corps.*

(Emphasis added.)

As indicated above, designation as a judge advocate does not determine where or when a commissioned officer serves this duty. Article 6, UCMJ, 10 USC § 806 (1984), further comments on the assignment for duty of judge advocates, as follows:

§ 806. Art. 6. Judge advocates and legal officer

(a) The *assignment for duty of judge advocates* of the Army, *Navy,* Air Force, and Coast Guard *shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandment of the Marine Corps.* The Judge Advocate General or senior members of his staff shall make frequent inspections in the field in supervision of the administration of military justice.

(Emphasis added.) The legislative history makes clear that Congress intended the Judge Advocate General of each service to play a substantial initiating role in the assignment process while reserving to military personnel

authorities the final say.[3] *See* Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 898-901 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

Article 26(c) (1969) also provides that a "military judge of a general court-martial *shall be designated by the Judge Advocate General,* or his designee, of the armed force of which the military judge is a member *for detail* in accordance with regulations prescribed under subsection (a)." (Emphasis added.) The language of designation is not new (10 USC § 8067) and generally refers to "a special duty classification." *See* 1967 U.S.Code Cong. & Admin. News 2113, 2114. Again the actual

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[3] 10 USC § 5013(g) provides:

(g) The Secretary of the Navy may—

(1) assign, detail, and prescribe the duties of members of the Navy and Marine Corps and civilian personnel of the Department of the Navy;

(2) change the title of any officer or activity of the Department of the Navy not prescribed by law; and

(3) prescribe regulations to carry out his functions, power, and duties under this title.

10 USC § 5131 creates the Bureau of Naval Personnel and 10 USC § 5132 empowers it as follows:

§ 5132. Bureaus: distribution of business; orders; records; expenses

(a) Except as otherwise provided by law, the business of the executive part of the Department of the Navy shall be distributed among the bureaus of the Secretary of the Navy considers expedient and proper.

(b) Each bureau shall perform its duties under the authority of the Secretary, and its orders are considered as coming from the Secretary.

(c) Under the Secretary, each bureau has custody and charge of its records and accounts.

(d) Each bureau shall furnish to the Secretary estimates for its specific, general, and contingent expenses.

For members of the Marine Corps, these powers are vested in the Commandant of the Marine Corps. *See* 10 USC § 5043(e)(3).

assignment of a designated military judge to Navy-Marine Corps Trial Judiciary is impliedly left to military personnel authorities. *See* SECNAVINST 5813.6C (13 April 1979).[4]

Finally, Article 26(a) (1969), in providing for detailing military judges to hear particular cases, states:

> (a) A military judge shall be detailed to each general court-martial. *Subject to regulations of the Secretary concerned,* a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(Emphasis added.) As noted in *United States v. Graf,* 35 MJ 450 (CMA 1992), these regulations provide that

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[4] 6. Organization. The Navy-Marine Corps Trial Judiciary is a naval activity as that term is defined in [U.S. Navy Regulations, 1973]. It is composed of the Office of the Chief Judge of the Navy-Marine Corps Trial Judiciary and such Judicial Circuits and their Branch Offices as may be established by the Judge Advocate General. The Judge Advocate Geenral may also establish Judicial Areas, each consisting of two or more Judicial Circuits, for the purpose of providing an intermediate level of supervision within the Trial Judiciary. Expansion of the Navy-Marine Corps Trial Judiciary will come from current manpower resources as determined by the Chief of Naval Operations, the Commandant of the Marine Corps, and the Judge Advocate General, acting in coordination. The Marine Corps Special Court-Martial Judiciary is disestablished, and its members are members of the Navy-Marine Corps Trial Judicary.

* * * *

8. Authority Over Organization, Functions and Administration. The Judge Advocate General is authorized to organize, administer, assign, and reassign functions to the Navy-Marine Corps Trial Judiciary and personnel attached thereto in accordance with [10 USC § 826 et. seq.].

detailing will be accomplished by the Chief Judge, the circuit military judge, or the circuit military judge's designee. *See* §§ 0120a(1) (1987); 0130a(1) (1990), Manual of the Judge Advocate General of the Navy.

In sum, the President and the Senate make a person a commissioned officer; the Secretary of the Navy makes that commissioned officer a judge advocate; the Judge Advocate General qualifies and classifies that judge advocate as a military judge; the Chief of Naval Personnal or the Commandant of the Marine Corps assigns him a duty station; and the Secretary of the Navy provides regulations for his detail to a particular case within that duty assignment.

III

Constitutional Tension

In view of these empowering statutes, it is now appropriate to turn to the United States Constitution. *See Dynes v. Hoover,* 61 U.S. (20 How.) 65, 61 U.S. 65, 15 L.Ed. 838 (1858). Article I, § 8 of the Constitution provides:

> The Congress shall have Power
>
> * * * *
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years.
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces[.]

In addition, I note that this same section of the Constitution further provides:

> The Congress shall have Power
>
> * * * *

> To constitute Tribunals inferior to the supreme Court;
>
> * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Clearly, these constitutional grants of authority are sufficient to provide for the above-noted statutory establishment of a military justice system with military trial and appellate judges. *See Solorio v. United States,* 483 U.S. 435, 441, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987); *Schlesinger v. Councilman,* 420 U.S. 738, 757-58, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975). *See also Rostker v. Goldberg,* 453 U.S. 57, 65-66, 101 S.Ct. 2646, 2652, 69 L.Ed.2d 478 (1981).

I also note the operative provisions of the Constitution which appellant asserts are applicable to the appointment of military judges. Article II states in pertinent part:

> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .
>
> [*H*]*e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and *all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*

(Emphasis added.) Article II further states:

> Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In view of these provisions of the Constitution, three distinct but nonetheless related issues are raised which this Court must decide. First, can Congress create the position of military judge and provide for its filling under Article I, § 8 of the Constitution without regard to the Appointment Clause of Article II, § 2 of the Constitution? (*See* Parts IV and V, below.) Assuming it cannot, what does Article II, § 2 of the Constitution require for a proper constitutional appointment to the office of military judge? (*See* Part VI below.) Finally, does the statutory system of designation/detail provided by Congress for military judges meet the above constitutional requirements? (*See* Part VII below.)

IV

The Scope of the Constitutional Power of Congress in Military Justice

It is beyond cavil that Congress has extremely broad powers to legislate in military matters generally and military justice matters in particular. Moreover, it is also quite clear that the Supreme Court has afforded great deference to Congress' decisions in this regard. The Coast Guard Court of Military Review has exhaustively summarized the relevant Supreme Court cases supporting these assertions in its decision in *United States v. Prive*, 35 MJ 569, 573-75 (1992).

Despite these pronouncements, the Supreme Court has also made very clear that its deference to Congress in military matters is not absolute. *Rostker v. Goldberg, supra*, 453 U.S. at 67-68, 101 S.Ct. at 2653, states:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of

> military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, *see Ex parte Milligan,* [71 U.S. (] 4 Wall.[)] 2, 18 L.Ed. 281 (1866); *Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 [40 S.Ct. 106, 108, 64 L.Ed. 194] (1919), but the tests and limitations to be applied may differ because of the military context. We of course, do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice. *See Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. [94] at 103 [93 S.Ct. 2080, 2087, 36 L.Ed.2d 772 (1973)]. In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.

Moreover, in *Middendorf v. Henry,* 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976), the Supreme Court had earlier held that Congress' military justice powers were not totally independent of the rest of the Constitution. According to then-Justice Rehnquist:

> We recognize that plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment.
>
> However, whether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject. *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974).
>
> In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and

naval forces, U.S. Const., Art. I, § 8, that counsel should not be provided in summary courts-martial. As we held in *Burns v. Wilson,* 346 U.S. 137, 140, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508 (1953):

> "[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." (Footnote omitted.)

425 U.S. at 43, 96 S.Ct. at 1291. *See also Solorio v. United States,* 483 U.S. at 451 n.18, 107 S.Ct. at 2933 n.18.

A question remains, however, whether Congress' power to make rules for the government and regulation of the Army and Navy is also limited or restricted by Article II, § 2, paragraph 2, clause 2 of the Constitution. The Coast Guard Court of Military Review in *United States v. Prive, supra,* has held that the Framers of the Constitution did not intend to include Congress' military justice power within the scope of the appointment clause. Relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. at 63-70, 102 S.Ct. at 2867-71, it asserts that the military justice system is one of those "narrow situations . . . in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* at 64, 102 S.Ct. at 2868 (plurality opinion). *See* 35 MJ at 575-76.

I disagree with the Coast Guard Court of Military Review for several reasons. First, the Supreme Court in *Northern Pipeline* held that the bankruptcy courts were

not legislative courts properly excepted from compliance with the requirements of Article III of the Constitution. While it stated that courts-martial created by Congress under Article I, § 8 of the Constitution were legislative courts, and thus were not affected by Article III of the Constitution, it went no further. The additional leap taken by the Coast Guard Court of Military Review in extending this decision into the area of Article II and the Appointments Clause in disregard of the plain language of the Constitution is simply not justified. *See Mimmack v. United States,* 97 U.S. 426, 437, 24 L.Ed. 1067 (1878); *see also Wood v. United States,* 107 U.S. 414, 417, 2 S.Ct. 551, 554, 27 L.Ed. 542 (1883); *Blake v. United States,* 103 U.S. 227, 232, 26 L.Ed. 462 (1881); 30 Op.Atty.Gen. 177, 180 (1913); 4 Op.Atty. Gen. 603, 610 (1847). *See generally* 4 P. Kurland and R. Lerner, *The Founders' Constitution,* 31-38, 98 (1987).

Second, the principle of separation of powers disputed in *Northern Pipeline* was between the congressional and judicial branches of our government. However, the Supreme Court in *Northern Pipeline* clearly recognized that the Constitution's exceptional plenary grant of power over the Nation's armed forces was to both the Legislative and Executive Branches of our Government. *Id.* 458 U.S. at 71, 102 S.Ct. at 2871. Accordingly, the *ratio decidendi* employed by the Supreme Court in *Northern Pipeline* cannot be logically applied to a dispute between branches of the government which *both* historically and constitutionally share that very power. *See generally* E. Corwin, *The President: Office and Powers (1787-1984)* at 296 (5th rev. ed. 1984).

Finally, the Supreme Court in *Freytag v. C.I.R.,* 501 U.S. ——, 111 S.Ct. 2631, clearly recognized *two* concerns of the Framers of the Constitution in adopting the Appointments Clause of the Constitution. Justice Blackmun said:

> The roots of the separation-of-powers concept embedded in the Appointments Clause are structural

> and political. Our separation-of-powers jurisprudence generally focuses on the danger of one Branch's aggrandizing its power at the expense of another Branch. *See Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 659, 102 L.Ed. 2d 714 (1989). The Appointments Clause not only guards against this encroachment *but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.*

Id. 501 U.S. at ——, 111 S.Ct. at 2638 (emphasis added).

More particularly, he later said:

> We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department the head of which is eligible to receive the appointment power. *The Appointment Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. See Wood*, at 79-80. So do we. For the chief judge of the Tax Court to qualify as a "Head of a Department," the Commissioner must demonstrate not only that the Tax Court is a part of the Executive Branch but also that it is a department.

Id. at ——, 111 S.Ct. at 2642 (emphasis added). This constitutional concern with Congress' excessive diffusion of the Executive's appointing power is simply not addressed by the *Northern Pipeline* rationale.

V

The Scope of the Constitutional Power of the Executive to Appoint Inferior Officers of the United States

The next inquiry concerns the actual scope of the Presidential appointment power. The general adage is that Congress creates the offices and the President appoints the necessary officers to fill them. *See generally* L. Tribe, *American Constitutional Law* 244 (2d ed. 1988) However, the words of the Constitution more particularly narrow the positions in the Federal government which are included within the constitutional appointment process.

Article II of the Constitution states:

> Section 1. The executive Power shall be vested in a President of the United States of America. . . .
>
> Section 2. The President shall be Commander in Chief of the Army and Navy of the United States. . . .
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and *he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, *and all other Officers of the United States,* whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment *of such inferior Officers,* as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

> Section 3. He shall . . . take Care that the Laws be faithfully executed, and *shall Commission all the Officers of the United States.*

(Emphasis added.)

In light of these provisions, the first question which arises is who are "all other Officers of the United States" or "such inferior Officers, as they think proper" within the meaning of Article II of the Constitution. The Supreme Court in *United States v. Germaine,* 99 U.S. 508, 510, 25 L.Ed. 482 (1879), defined such officers as "all persons who can be said to *hold an office* under the government about to be established under the Constitution. . . ." (Emphasis added.) More recently, the Supreme Court spoke particularly on the office holders who could be considered "Officers of the United States," as follows:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine, supra,* is a term intended to have substantive meaning. *We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.*

Buckley v. Valeo, 424 U.S. at 125-26, 96 S.Ct. at 685 (emphasis added). *See Freytag v. C.I.R.,* 501 U.S. at ——, 111 S.Ct. at 2640. In this light, a critical question in this case is whether a military judge is an Officer of the United States.

I note that this Court most recently in *United States v. Graf,* 35 MJ 450, 465 (CMA 1992), and *United States v. Mabe,* 33 MJ 200 (CMA 1991), analyzed the statutes and regulations concerning the military judge and concluded that "the Uniform Code of Military Justice contemplates that a military judge be a real judge as commonly understood in the American legal tradition." 35

MJ at 465. In addition, I note that in *Freytag v. C.I.R., supra,* the Supreme Court expressly held that a special trial judge established by Congress "as an aide to [a] Tax Court judge" is "an 'inferior Officer' whose appointment must conform to the Appointments Clause." 501 U.S. at ——, 111 S.Ct. at 2640.

The Supreme Court in *Freytag* articulated its reasoning for reaching this conclusion, as follows:

> The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. *See Burnap v. United States,* 252 U.S. 512, 516-517, 40 S.Ct. 374, 376-377, 64 L.Ed. 692 (1920); *United States v. Germaine,* 99 U.S. 508, 511-512, 25 L.Ed. 482 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. *Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.*
>
> Even if the duties of special trial judges under subsection (b)(4) were not as significant as we and the two courts have found them to be, our conclusion would be unchanged. Under §§ 7443A(b)(1), (2), and (3), and (c), the chief judge may assign special trial judges to render the decisions of the Tax Court in declaratory judgment proceedings and limited-

> amount tax cases. The Commissioner concedes that in cases governed by subsections (b)(1), (2), and (3), special trial judges act as inferior officers who exercise independent authority.

501 U.S. at ——, 111 S.Ct. at 2640 (emphasis added).

The position of military judge is established by law. *See* Arts. 26 and 66, UCMJ, 10 USC §§ 826 and 866, respectively. The duties and functions of a person in this position are also established by statute. *See* Arts. 26, 39, 51, and 66, UCMJ, 10 USC §§ 826, 839, 851, and 866, respectively. The Code authorizes military judges to hear and determine motions on various pretrial, trial, and posttrial matters (*see* Art. 39(a)); rule on all questions of law and interlocutory questions at courts-martial (Art. 51(b)); and impose Federal convictions up to and including life in prison, punitive separations from the service, and substantial financial penalties (Arts. 16(1)(B) and 18, UCMJ, 10 USC §§ 816(1)(B) and 818, respectively). A judge sitting with court members also instructs them on the various matters necessary to reach appropriate findings and sentences, even in capital cases where a servicemember's life is at stake. (Art. 51(c)). These are not ministerial tasks but judicial ones calling for the exercise of significant discretion. *See United States v. Graf*, 35 MJ 450; *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). Finally, judges exercise independent authority. Art. 37, UCMJ, 10 USC § 837. *See United States v. Graf, supra.* In my view, the military judges and appellate military judges are "Officers of the United States," as provided for in Article II, § 2 of the Constitution.

VI

The Constitutional Requirements for a Valid Appointment

My next inquiry concerns the particular requirements provided in the Constitution for a valid appointment of

"Officers of the United States." The answer to this question in large part depends on whether a military judge is one of "all other Officers of the United States" or is one of the "inferior Officers" generally denominated in Article II, § 2. *See United States v. Germaine,* 99 U.S. 508, 509-10, 25 L.Ed. 482 (1879). *See generally* R. Rotunda, J. Nowak, and J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 9.4 at 504-05 (1986). In light of the Supreme Court's characterization of a special tax court judge as an inferior officer in *Freytag v. C.I.R., supra,* I have no reservation in concluding that a military trial judge and military appellate judge are "inferior Officers" of the United States within the meaning of Article II, § 2. *See also Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612.

In this light a military judge need not be appointed by the President by and with the Advice and Consent of the Senate. However, it is required that he be appointed by "the President alone," a Court of Law, or a Head of a Department. *Freytag v. C.I.R., supra.* Nevertheless, the lead opinion and the Navy-Marine Corps Court of Military Review in *United States v. Coffman,* 35 MJ 591 (1992), have held that this constitutional requirement is satisfied by a military officer's earlier commission and succeeding promotions by the President with the Advice and Consent of the Senate. Relying on *Shoemaker v. United States, supra,* they assert that no further appointment by the President, a Court of Law, or a Head of a Department is required to permit a "legally trained" military officer to constitutionally assume the office of military trial or appellate judge.[5]

The Navy-Marine Corps Court of Military Review articulated its rationale for its holding in *Coffman* as follows:

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[5] This argument on its face fails to justify appointment of civilians to the Court of Military Review as authorized by Article 66, Uniform Code of Military Justice, 10 USC § 866.

> Assuming *arguendo* that [the Appointments Clause] applies to military judges, the fact is that all military judges must be commissioned officers of the armed forces of the United States and, as such, have by law already been *appointed* by the President. Art. 26(b), UCMJ, 10 U.S.C. § 826(b); 10 U.S.C. §§ 101(4), 101(15), 531, 593, 624, 5001(6), 5912. Depending upon grade, component, and presence on the active-duty list, some of these commissioned officers by law must also have had their appointments confirmed by and with the advice and consent of the Senate. 10 U.S.C. §§ 531, 593, 624, 5912. All military judges must be lawyers. Art. 26(b), UCMJ, 10 U.S.C. § 826(b). The duties these commissioned officers are *detailed* to perform as military judges are within the sphere of their official duties and are germane to the office they already hold. A second appointment from the President to a commissioned officer to perform the duties of a military judge is simply not required. *Cf. Shoemaker v. United States*, 147 U.S. 282, 299-301, 13 S.Ct. 361, 390-391, 37 L.Ed. 170, 185 (1892) (Army officers (engineers) were not required to obtain a second appointment to perform duties on a commission created by Congress to acquire lands for a park). Accordingly, we conclude the appellant's first assignment of error is also without merit.

35 MJ at 592.

The lead opinion more particularly posits two reasons why no further constitutional appointment of military judges is required by the Appointments Clause. First, it concludes that the office of military judge is not a "new office," so no additional appointment is required under *Shoemaker v. United States, supra.* Assuming it is a new office, the opinion holds that the germaneness of its duties to those duties previously performed by "legally trained military officers" also precludes the need for a second appointment under *Shoemaker.* I disagree.

The lead opinion concedes that a military judge is an Officer of the United States. Moreover, it noes that the new powers of this officer were previously shared by the members of a court-martial, its president, and its law officer. Thus, Congress did not increase the power and duties of "an existing office" but created a new office to which these powers were transferred. It is the removal of these powers and duties from commissioned military officers, not their addition thereto, which renders inapposite the lead opinion's no-"new-office" argument.

I also find that the lead opinion grossly misapprehends the nature of the duties of a military judge and his contribution to military justice. The creation of the military judge in 1969 was a watershed event because it introduced for the first time, statutorily, *a professional judiciary* at courts-martial.[6] S.Rep. No. 1601, 90th Cong., 2d Sess. 3,

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[6] The establishment of the military judge was not the only change accomplished by the legislation of 1968. Also, for the first time in the history of American military justice, a service-member could be tried and sentenced by a single military officer without court members in serious non-capital cases. Art. 16(c)(B), UCMJ, 10 USC § 816(1)(B). *See* H. Moyer, *Justice and The Military* § 2-620 at 536 (1972); Douglass, *The Judicialization of Military Courts*, 22 Hast. L.J. 213, 220 (1971).

Representative Philbin commented on the reason for this bill as follows:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from the military activity in Southeast Asia. Besides the savings in time and manpower afforded by the bill, the bill provides meaningful benefits and protections to the accused.
>
> The enactment of this legislation will permit the procedure for trials by special and general courts-martial to conform more closely with the procedure used in the trial of criminal cases in the U.S. district courts and will enhance the prestige and effectiveness of the law officer, whose name is changed by the bill to "military judge," so that his judicial statute and authority in the courtroom will more closely approximate that of a civilian trial judge. The bill allows the military judge to rule finally on certain procedural matters, such as motions for find-

14 (1968). *See* Ervin, *The Military Justice Act of 1968*, 45 Mil.L.Rev. 77, 83, 88-91 (1969). *See generally* Ross, *The Military Justice Act of 1968: Historical Background,*

> ings of not guilty, on which he now may be overruled by the court members who are untrained in the law. The bill provides for pretrial and posttrial sessions to be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions. The bill provides for trial in special and general court-martial by a military judge alone without court members if the accused requests and the request is approved by the military judge. *These last two provisions are expected to save innumerable man-hours of line officers who would otherwise be required to be in attendance at courts-martial, as well as improving the internal efficiency of the justice system.*
>
> * * * *
>
> *The enactment of this bill will be the most significant advance in the field of military justice since the enactment of the Uniform Code of Military Justice in 1951.*

114 Cong.Rec. 30563-64 (1968) (emphasis added).

Representative Bennett, a central figure in the development of this legislation, made this statement regarding the 1968 legislation:

> The need for this bill has become acute because of the increased size of our Armed Forces resulting from our present military activity in Vietnam. The bill provides meaningful benefits and protections to the accused, as well as streamlining procedures. The bill contains the following provisions, which are designed to increase the fairness of the military justice system: First, the accused must be afforded the right to be defended by a qualified lawyer at special courts-martial—heretofore such a right only existed in the case of general courts-martial; second, before a bad conduct discharge can be adjudged at a special court-martial, the accused must be represented by a qualified lawyer and the proceedings must be conducted by a "military judge"—a term I will discuss below—except where physical conditions or military exigencies prevent one from being obtained; third, the bill extends the time in which the accused can petition for a new trial from 1 to 2 years; and fourth, an accused faced with trial at summary court-martial can object to such an informal trial, at which time the convening authority must bring charges at a special or general court-martial or dismiss them.
>
> *The enactment of H.R. 15971 will permit the procedure for trials in the military to conform more closely to the procedures*

23 JAG.J. 125 (1969). In this context, a holding that this office is new is an understatement.

Turing to the lead opinion's "germane duties" rationale, I also find its application in the present case unacceptable. *Shoemaker v. United States, supra,* is an exception to normal Appointments Clause practice, and a very narrow one at that. The lead opinion's extension of that case beyond its facts to permit the blanket investing of "legally trained" military officers with the office of military judge without compliance with the Appoint-

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used in the Federal courts. The bill also enhances the prestige and effectiveness of the law officer, whose name is changed to "military judge." The role of the "military judge" will closely approximate that of a civilian trial judge: he will rule finally on certain procedural matters and will hold open pretrial and posttrial sessions without the presence of the court for the purpose of deciding procedural questions. An accused can request a special and general court-martial by a "military judge" alone.

The bill changes the name of the intermediate appellate agencies in the military from boards of review to courts of military review. The bill requires that the judges of these courts and of courts-martial be part of an independent judiciary. In addition, the bill authorizes a military form of release on bail pending appeal, the need for which has been pointed out in several recent cases.

The importance of this legislation cannot be overstated. It is particularly needed in Vietnam, as has been pointed out by General Westmoreland; for under the bill line officers will be free from the necessity of serving as court members in many cases; and many previously wasted man-hours will be saved because of streamlined procedures.

I think it is most significant that the House of Representatives, which fathered the Uniform Code of Military Justice, also initiated the action on this legislation and now has the opportunity to put the capstone on it. *The enactment of H.R. 15971 will be the most significant advance in the field of military justice since enactment of the Uniform Code of Military Justice. I heartily recommend the House approve the Senate amendments.*

114 Cong.Rec. 30565 (1968) (emphasis added).

ments Clause is simply unprecedented. Strictly speaking, such an approach might be appropriate only if the "legally trained" military officers also held a specific presidentially appointed military justice office such as the Judge Advocate General of the Navy. *See* 10 USC § 5148.[7] Otherwise, the lead opinion's general-duties analysis, at least in my view, constitutes judicial activism.

In *Shoemaker,* the Supreme Court considered the devolution of additional duties not on commissioned military officers in general or on commissioned military engineering officers. Instead, they devolved on military officers already holding a specific military or civilian office requiring a presidential appointment. *See* Thain, *Legislative History of General Staff of the Army of the United States* 3, 485 (1901). *See generally Hoeppel v. United States,* 85 F.2d 237, 241 (D.C.Cir.1936). One Rock Park Creek Commission member who was a military officer had been previously appointed by the President to the

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[7] Neither of the two cases cited in *Shoemaker v. United States,* 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), supports a "commissioned officer" exception to the Appointments Clause or its general-military-duty rationale as created by the lead opinion.

The petitioner in *Smith v. Whitney,* 116 U.S. 167, 6 S.Ct. 570, 29 L.Ed. 601 (1886), was an officer of the Navy who was later *appointed by the President by and with the consent of the Senate,* as the "chief of the bureau of provisions and clothing and paymaster general in the department of the navy, with the relative rank of commodore." *Id.* at 168, 6 S.Ct. at 570.

The petition in *Wales v. Whitney,* 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 577 (1885), was an officer in the Navy who *was later appointed by the President, by and with the consent of the Senate* as "chief of the bureau of medicine and surgery in the department of the navy," which office carried the additional title of "surgeon general of the navy." *Id.* at 569, 5 S.Ct. at 1052. *See* 10 USC § 5137, Historical and Revision Notes, R.S. 421 and 426.

The Supreme Court's holding that these military officers could be court-martialed for offenses under the Articles for the Government of the Navy does not logically suggest that an additional presidential appointment was not required for their assumption of their more particular civil or military offices.

Office of the Chief of Engineers of the United States Army. *See* R.S. §§ 1094, 1151, and 1193 (1878), and 17 Op. Atty. Gen. 2, 3 (1881); *see generally* 1 Stat. 749 (1799) and 20 Stat. 151, § 13 (1878); *see also* 10 USC § 3036 (1956). The second, also a military officer, had previously been "detailed" by the President as the Engineer Commissioner for the District of Columbia. *See* Ch. 180 § 2, 20 Stat. 103 (1878); 26 Stat. 1113 (1890); *see also* 10 USC § 3534 (1956). Thus, the additional "germane" duty of membership on the Rock Creek Park Commission cannot be simply said to have generally devolved on a diffused pool of commissioned officers or commissioned officers with engineering training.

Second, the *Shoemaker* decision makes clear that this extraordinary application of the Appointments Clause rests on a conclusion that the new additional duties are "germane to the offices already held by them." 147 U.S. at 301, 13 SCt. at 391. More particlularly, the Supreme Court there said:

> It is true that it may be sometimes difficult to say say whether a given duty, devolved by statute *upon a named officer,* has regard to the civil or military service of the United States. *Wales v. Whitney,* 114 U.S. 564, 569, 5 S.Ct. 1050 [1052]; *Smith v. Whitney,* 116 U.S. 167, 179, 181, 6 S.Ct. 570 [576, 577]. But, in the present case, the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties.

147 U.S. at 301, 13 S.Ct. at 391 (emphasis added). The additional duties as a member of the Rock Creek Park Commission were particularly related to the military officers' office as Chief of Engineers of the United States Army and office as Engineer Commissioner for the District of Columbia. Clearly neither duty as engineer nor training as an engineer sufficed.

Appellate government counsel and various amici have also asserted that the duties of a military judge are "germane" to the various powers of a commissioned officer under the Uniform Code of Military Justice. These include the power to "quell quarrels, frays, and disorders" (Art. 7(c), UCMJ, 10 USC § 807(c)); make arrests (Art. 9(b), UCMJ, 10 USC § 809(b)); serve as an investigating officer (Art. 32, UCMJ, 10 USC § 832); impose non-judicial punishments (Art. 15, UCMJ, 10 USC § 815); and serve as court-martial members at special courts-martial without a military judge (Art. 25(a), UCMJ, 10 USC § 825(a)). I do not consider a military judge's judicial duties similar to or within the sphere of the general military justice responsibilities of a line officer. Moreover, the latter duties are collateral and irregular and, therefore, also lack the specificity-of-office considered in *Shoemaker*.

Finally, the available lower court decisions applying *Shoemaker* simply do not support a broad military commission-promotion exception to the Appointments Clause for legally trained officers. The Court of Appeals for the Eleventh Circuit applied *Shoemaker* in the context of the "Investigating Committee of the Judicial Council of Eleventh Circuit." *See In the Matter of Certain Complaints Under Investigation,* 783 F.2d 1488 (11th Cir. 1986). It noted that the members of this committee were *sitting federal judges* already appointed by the President who were later selected for service *on this judicial committee* by the Chief Judge of the Circuit. It held:

> Their selection for service on the Committee does not gain them new positions in any meaningful sense; *to the contrary, service on a committee of the judicial council, when called upon, is merely an outgrowth of their existing responsibilities. See Shoemaker v. United States,* 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893) (*a statutory expansion of the functions of an existing position does not create a*

> *new office requiring re-appointment, at least where the newly-added duties are "germane" to eixsting functions*). *See also* 28 U.S.C. §§ 291, 292 (the Chief Justice may designate and temporarily assign any circuit judge to act as a circuit judge in another circuit if necessary; chief judges of circuit courts may make similar designations and temporary assignments with respect to district judges and districts within their circuits); *id.* §§ 293-96.

783 F.2d at 1515 (emphasis added). A previously appointed judge is not the same as a previously commissioned officer who is simply "legally trained."

Judge Lamberth of the United States District Court for the District of Columbia also impliedly rejected the "legally trained" military-officer interpretation of *Shoemaker*. He said:

> The [Supreme] Court rejected this argument [that a commission member could not serve absent Senate approval], holding that:
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> > As, however, the two persons whose elegibility is questioned were at the time of the passage of the act and of their action under its officers of the United States who had been theretofore appointed by the President and confirmed by the Senate, we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that *Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.*
>
> *Id.* at 301,, 13 S.Ct. at 391 (emphasis added).

> The *Shoemaker* case is distinguishable from this case in two important respects. *First, the provision challenged in Shoemaker added certain duties to two offices; it did not confer additional responsibilities on any particular officer. Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from office after the commission was established, he would no longer have served on the commission*—the new Chief of Engineers or Engineer Commissioner would have taken over those duties. Here, however, Mr. Wall was designated the new Director of OTS. Although the position was given to him by virtue of his prior position, it was given to him.

Olympic Federal S & L Assn. v. Director, Office of Thrift Supervision, 72 F.Supp. 1183, 1192-93 (D.D.C.1990) (some emphasis added). Again, no mention whatsoever was made concerning their remaining status as military officer or their general training as engineers.

Lastly, *Gila River Pima-Maricopa Indian Community v. United States,* 8 Cl.Ct. 700 (1985), provides an example of Congress' recognition and treatment of the *Shoemaker* problem. That decision notes that Congress, in constituting the United States Claims Court in 1982 by using trial judges from the old Court of Claims, expressly confronted a *Shoemaker* problem. Judge Merow provided the following footnote in his opinion:

> Thus, in discussing the constitutionality of the provision of Pub.L. No. 97-164 reconstituting the trial division of the Court of Claims into a United States Claims Court comprised of the trial judges of the Court of Claims, H.R. Rep. No. 96-1300, 96th Cong., 2d Sess. 23, n.25, states as follows:
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> "Article III, section 1, of the Constitution explicitly empowers the Congress to ordain and establish inferior courts. Consequently, the only questions con-

> cern the relation between the power of Congress, under Article I, section 8, cl. 18, of the Constitution to alter, enlarge, or restrict the functions of existing federal officers and the requirement of the Appointments Clause, Article II, section 2, cl. 2, that appointments as officers of the United States be made in the manner prescribed by that clause. Stated differently, this involves a reconciliation of the Supreme Court's decisions in *Shoemaker v. United States,* 147 U.S. 282, 301, 13 S.Ct. 361, 391, 37 L.Ed. 170 (1893), and *Buckley v. Valeo,* 424 U.S. 1, 118-36, 96 S.Ct. 612, 681-90, 46 L.Ed.2d 659 (1976). The earlier case stated the principle that Congress may, by statute, confer new duties on officers of the United States, at least where the new duties are 'germane' to their existing functions, without the necessity of reapportionment under the Appointments Clause. The lat[t]er holds that Congress may not itself appoint officers of the United States.
>
> The Committee has concluded that the carry-over of the trial judges into the Claims Court is a modification of an existing position rather than a legislative appointment to a new one, governed by *Buckley.* The bill merely would confer 'germane' new duties and extend the tenure of the existing trial judges as permitted by *Shoemaker,* rather than create a new office."

8 Cl.Ct. at 702. Examination of the legislative history of Article 26 especially since 1968 reveals no similar statements by Congress concerning *Shoemaker*'s applicability to "legal trained" or untrained commissioned officers and the newly created position of military judge.

VII

Application to the Present Case

Finding the *Shoemaker* decision inapplicable, my final concern is whether the system of appointment of a military judge provided in the Uniform Code of Military

Justice nonetheless meets the standards of Article II, § 2 of the Constitution. I have noted earlier that military judges are not technically "appointed" under the Code, and their being invested with office is a more complicated process than represented in the granted issue. In addition, I note that Major Pesik, the military judge who presided at appellant's court-martial, was a Marine, and the appellate court panel for this case was composed of both Navy and Marine officers.

Turing first to Major Pesik, he was commissioned an officer in the United States Marine Corps by appointment of the President, by and with the Advice and Consent of the Senate. 10 USC § 531(a); *see* 10 USC § 532 or § 593. In accordance with the normal course of events, he rose to the grade of major in the Marine Corps, some of his promotions requiring appointment by the President alone and some also requiring the Advice and Consent of the Senate. 10 USC § 624(c). At some point, with the approval of the Secretary of the Navy, he was designated "a judge advocate." 10 USC § 5587a. His assignment for duty as a judge advocate of the Marine Corps was made by direction of the Commandant of the Marine Corps. Art. 6(a). Moreover, he was certified by the Judge Advocate General of the Navy to perform the duties of trial and defense counsel detailed for a general court-martial. Art. 27(b). Later, he was certified as qualified to be a military judge and designated for detail as such by the Judge Advocate General of the Navy. Art. 26(b). Finally, he was assigned to duty at the Sierra Judicial Circuit by the Commandant of the Marine Corps on the recommendation of the Judge Advocate General of the Navy.

The Marine Colonel and Navy Captains on the Court of Military Review were also commissioned officers who were appointed by the President with the Advice and Consent of the Senate. Their promotions to these distinguished grades were accomplished by appointment of

the President with the Advice and Consent of the Senate. They were constituted a court by the Judge Advocate General of the Navy and designated for detail to it by that same officer.

The bottom line is that none of these military judges was appointed to that position or a germane position by the President alone, the Courts of Law, or the Head of a Department.[8]

VIII

CONCLUSION

Duty to Inform

In summary, it is my view that a military judge is not only a military officer but an "inferior Officer" of the United States as provided for in Article II, § 2 of the Constitution. Congress under Article I, § 8 of the Constitution was fully competent to create such a military judicial position and empower the holder of this office to dispense justice to servicemembers at courts-martial. Having done so, however, it was further required by Article II, § 2 to provide that the person who fills this office be appointed by the President, a Court of Law, or the Head of a Department.

The reason that Congress has not provided for this type of appointment for military judges is not readily apparent. The lead opinion suggests that Congress, cognizant of the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 made a conscious

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[8] The term "Heads of Departments" for purposes of the Appointments Clause has recently been defined by the Supreme Court to be a member of the Cabinet. *See Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——-——, 111 S.Ct. 2631, 2642-43, 115 L.Ed.2d 764 (1991). "Courts of Law" are also defined in terms of their "exclusively judicial role." *Id.* at ——, 111 S.Ct. at 2645. Neither the Secretary of the Navy, the Commandant of the Marine Corps, nor the Judge Advocate General of the Navy meets either of these tests.

decision that a second appointment by the President of a commissioned officer to perform these new court-martial duties was not necessary. Examination of the legislative history of the statutes creating this position, however, offers no express support for this theory. *Cf. Gila River Pima-Maricopa Indian Community v. United States,* 8 Cl.Ct. at 702 n. 1. Moreover, examination of the *Shoemaker* decision in light of the legislation creating the military judge suggests to me that this decision's rationale is inapplicable to the case at bar. *See Olympic Fed. S & L v. Office of Thrift Supervision,* 732 F.Supp. at 1192-93.

My own view is more consistent with congressional silence. The office of military judge was established in 1968 when the Supreme Court utilized a "mode of appointment" approach to the Appointments Clause. *See* Note, *Toward a New Functional Methodology in Appointments Clause Analysis,* 60 G.W.L.Rev. 536, 539-43 (1992); *cf.* Note, *Power of Appointment to Public Office Under The Federal Constitution,* 42 Harv.L.Rev. 426 (1929). In other words, an "inferior Officer" of the United States was a Federal office holder whose appointment Congress required be made by the President, a Court of Law, or the Head of a Department. *United States v. Mouat,* 124 U.S. 303, 8 S.Ct. 505, 31 L.Ed. 463 (1888). *See Hoeppel v. United States,* 85 F.2d 237, 241 (D.C.Cir.1936). It was not until 1976 in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, that the "mode of appointment" approach was jettisoned in favor of a functional duty approach to Appointments Clause questions. *See* Note, 42 Harv.L.Rev. at 544-52; *see also Freytag v. C.I.R.,* 501 U.S. ——, 111 S.Ct. 2631. In my view, there is simply no doubt that a military judge's duties and responsibilities now qualify him as an "inferior Officer" of the United States.[9]

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[9] The Supreme Court has recently denied petitions for certiorari in two cases where this Appointments Clause issue was raised for

The Remedy

Appellant has shown no specific prejudice to his case due to the failure to provide for compliance with the Appointments Clause. However, simple affirmance is not sufficient under the *de facto*-appointee rationale of *Buckley* and the *Northern Pipeline* cases. It is the duty of this Court also to point out the unconstitutional statutory deficiency as this opinion has done. It should be in Congress' hands to render appropriate legislation to fix this statutory deficiency. In the interim, the President could, based on the rationale in this opinion, direct the Head of the Department of Defense to start appointing military judges as necessary to perform military justice functions in the department. *See United States v. Matthews,* 16 MJ 354, 382 (CMA 1983). Thus, the Executive Branch's constitutional role in this area, as envisioned by the Appointments Clause, would be restored.

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the first time in that Court. *Bolado v. United States,* —— U.S. ——, 113 S.Ct. 321, 121 L.Ed.2d 242 (1992); *Allen v. United States,* —— U.S. ——, 113 S.Ct. 324, 121 L.Ed.2d 244 (1992). However, as the Supreme Court itself has consistently said, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver,* 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361 (1923). *See generally* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* 269-72 (6th ed. 1986).

WISS, Judge (dissenting):

Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987),[1] has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Once the legal chaff is separated out, the grain of the related questions of law before this Court is quite clear:

First, in exercising its power "[t]o make Rules for the Government and Regulation of the land and naval Forces" under Article I, § 8, clause 14 of the Constitution, is Congress exempt from the prescriptions of Article II, § 2, clause 2 of the Constitution—the Appointments Clause—regarding appointment of "Officers of the United States"?

Second, within the meaning of the Appointments Clause and the decision in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), do Articles 26 and 66 of the Uniform Code of Military Justice, 10 USC §§ 26 and 66, respectively, establish a distinct office of military judge?

Third, if so, does the decision in *Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed.2d 170

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[1] That is the only case in which the Supreme Court of the United States has granted plenary review of a decision of this Court, *see* Art. 67a, Uniform Code of Military Justice, 10 USC § 867a (1989); *see also* Art. 67(h)(1), UCMJ, 10 USC § 867(h)(1) (1983). There, the Court held that jurisdiction of a court-martial depended solely on the accused's status as a member of the armed forces, not on the "service connection" of the offenses charged. In doing so, the Court expressly overruled its decision in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), that had rested significantly on the historical viewpoint that "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers committing civilian offenses has been viewed with suspicion." *O'Callahan v. Parker, supra* at 268, 89 S.Ct. at 1688 (footnote omitted), quoted in *Solorio v. United States*, 483 U.S. 435, 442, 107 S.Ct. 2924, 2928, 97 L.Ed.2d 364 (1987).

(1893), permit the conclusion that the duties of that distinct office are "germane" to the duties either of military officers generally or "legally trained military officers" specifically, so that the Appointments Clause does not require separate appointment of some such military officers as military judges?

Today, a majority of this Court approves the present practice of appointment of military judges by officials [2] below the rank of those set out in Article II, § 2, clause 2 of the Constitution—the Appointments Clause. In doing so, however, I believe that the various opinions of my colleagues who join in that disposition improperly reconcile the two provisions of the Constitution that are in issue in the first question and incorrectly read the decisions of the Supreme Court of the United States on which answers to the second and third questions depend. Accordingly, I dissent.

I

Without question, the Constitution vested in Congress the powers to "raise and support Armies" (cl. 12); "provide and maintain a Navy" (cl. 13); and "make Rules for the Government and Regulation of the land and naval Forces" (cl. 14). Art. I, § 8. The critical question at the outset here is not Congress' authority to legislate in this area by constructing a military justice system and providing for trial and appellate military judges; rather, it is whether, in doing so, Congress is free from the facially unconditioned restriction of the Appointments Clause regarding how those military judges must be appointed.

The Chief Judge, particularly in Part IV of his opinion, thoughtfully treats the matter of deference to Congress in its regulation of military affairs. *See United States v.*

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[2] One important dimension to the problem underlying this appeal is that it is not entirely clear *who* "appoints" military judges. As the separate opinion of Chief Judge Sullivan makes apparent, the answer is not the obvious first guess (the Judge Advocate General of each service) and is not consistent among the armed forces.

Prive, 35 MJ 569, 573-77 (CGCMR 1992). The Supreme Court has instructed that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981), quoted in *Solorio v. United States*, *supra*, 483 U.S. at 447, 107 S.Ct. at 2931. *See also Goldman v. Weinberger*, 475 U.S. 503, 508, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986).

Deference, however, does not equate to abdication. The Supreme Court has recognized that, in light of Congress' regulatory powers over the military, constitutional rights might have application and meaning in the military different from the civilian community, *see, e.g., Solorio v. United States*, *supra* 483 U.S. at 447, 107 S.Ct. at 2931. The Court, however, has never instructed that Congress' regulatory power is a talisman, in the face of which the remainder of the Constitution withers. Indeed, quite to the contrary, the Court stated in *Rostker v. Goldberg*, *supra*, 453 U.S. at 67, 101 S.Ct. at 2653:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context. We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.

(Citations omitted.)

The Constitution's grant of regulatory power to Congress over military affairs is no more plenary than, for instance, its grant of power to Congress in Article I "[t]o . . . provide for the . . . general Welfare of the

United States" (§ 8, cl.1); or over Federal elections (§ 4); or "[t]o make all Laws which shall be necessary and proper for carrying into Execution" these and other powers specifically set out elsewhere in the Constitution (§ 8, cl. 18). When the Supreme Court in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), was presented with the argument that appointment of members of the Federal Election Commission was pursuant to these plenary powers of Congress and, thus, not subject to the Appointments Clause, the Court responded:

> But Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 [4 L.Ed. 579] (1819), so long as the exercise of that authority does not offend some other constitutional restriction. We see no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers.
>
> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the Clause. . . . No class or type of officer is excluded because of its special functions.

Id. 424 U.S. at 132, 96 S.Ct. at 688.

I agree. There is nothing anywhere in the Constitution of the United States or in decisions of the Supreme Court that supports the notion that mandates of the Constitution

do not penetrate the walls of the military enclave. Further, unlike application of certain individual rights to service-members, there is nothing about the Appointments Clause that requires a different application in a military context than it does in the rest of the United States.[3] Nothing could be plainer than that the Appointments Clause, by its own terms, does not except appointment to offices created under Congress' power to regulate the military any more than it excepts appointment to offices created under any of Congress' other numerous, plenary powers.

In short, as the Supreme Court succinctly stated in *Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2639, "Neither Congress nor the Executive can agree to waive this structural protection" of the Appointments Clause.[4]

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[3] Judge Crawford's attempt to distinguish between civilian and military judiciaries based on "military exigencies" is a strawman. Nothing in any of the other opinions in this case would have any untoward impact whatsoever on the ability of the Judge Advocate General to *tactically move and reassign* military judges or to meet the operational realities of a military in the field, as well as in the garrison. At the same time, there was no occasion of which this Court has been made aware that required any sort of *emergency appointment* of military judges resulting from deployment of our armed forces. Simply stated, Judge Crawford's implied alarm—that appointment of military judges by, say, the Secretary of Defense (*see* opinion, *infra*) somehow undermines the response capability of our armed forces in some manner that appointment by the Judge Advocate General does not—is a *false* alarm.

[4] Judge Crawford's constricted focus on the purpose of the Appointments Clause is a misstep off the cleared path of the law. As the Supreme Court of the United States unequivocally instructed in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. ——, ——, 111 S.Ct. 2631, 2639, 115 L.Ed.2d 764 (1991), the Appointments Clause not only involves the constitutional tug-of-war between the Executive and Legislative Branches but also ensures that responsibility to make appointments to offices in the Executive Branch will not be delegated and diffused to a level below the very highest, responsive level of "the President alone," "Courts of Law," or "Heads of Departments."

Accordingly, if the Uniform Code of Military Justice established a distinct office of military judge, appointments to fill that office must comport with the Appointments Clause.

II

In an effort to identify who are included as "Officers of the United States" and other "inferior Officers" within the meaning of the Appointments Clause, the Supreme Court has said:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine* [, 99 U.S. 508, 510, 25 L.Ed. 482 (1879)], is a term intended to have substantive meaning. We think its fair import is that *any appointee exercising significant authority pursuant to the laws of the United States* is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of that Article.

Buckley v. Valeo, supra, 424 U.S. at 126, 96 S.Ct. at 685 (emphasis added), cited with approval in *Freytag v. C.I.R., supra,* 501 US. at ——, 111 S.Ct. at 2640.[5]

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[5] As the Chief Judge points out, *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), marked the first time that the Supreme Court used this approach of examining the functions and duties of a purported office to determine whether it was an Office of the United States. Prior to that decision, the approach was one that could fairly be characterized as rather circular: A position was an Office only if Congress required that the position be filled by the President, a Court of Law, or a Head of a Department. In other words, this "mode of appointment" approach essentially concluded that an Office was an Office when Congress *said* it was an Office by providing for appointment thereto consistent with the Appointments Clause. The functional-duty approach followed since *Buckley,* of course, is more consistent with the principle that even Congress cannot legislate in violation of the Appointments Clause, *see Freytag v. C.I.R., supra.*

Military judges are "established by Law," and their "duties and functions are . . . delineated in a statute"—specifically, Articles 26 and 66 of the Code. *See* 501 U.S. at ——, 111 S.Ct. at 2640. Further, their functions and responsibilities, as fully reflected in the Chief Judge's opinion, 36 MJ at 249-250, and prescribed in the statute and in the decisions of this Court, are leaps and bounds more than "ministerial tasks"; and "[i]n the course of carrying out these important functions, [military judges] exercise significant discretion." 501 U.S. at ——, 111 S.Ct. at 2640; *see* Criminal Law Note: *An Ongoing Trend: Expanding the Status and Power of the Military Judge,* The Army Lawyer 23 (Dept. of the Army Pamplet 27-50-239, October 1992). In my view, application of the Supreme Court's functional-duty analysis compels the conclusion that there is a distinct office of military judge.

The lead opinion concludes otherwise, after tracing the evolution of the law member to the law officer to the military judge. As to the final stage in this process, the plurality opines:

> The Military Justice Act of 1968 changed the title of the law officer to military judge, in order to increase his stature, and transferred more duties from the president of the court-martial to the military judge. *See* Art. 26, 82 Stat. 1336. *Since the Act merely transferred authority and duties from one official of the court-martial to another and renamed the law officer, it did not create a new office.*

36 MJ at 229-230 (emphasis added). This casual view of the functions and duties of military judges is not only demeaning; it is inaccurate.

First, the lead opinion itself acknowledges an *incredibly* important *addition* to the functions and discretion of the military judge over *any* other single official that previously sat at a court-martial: To sit, alone, as a court-

martial and determine, alone, the issue of guilt and the sentence of a convicted accused in serious non-capital cases. This extraordinary power extends to convicting servicemembers of such serious felonies as murder and espionage and imposing any sentence other than death—including life imprisonment. Never before did any single member of the armed forces—the president of a court-martial or anyone else—have the statutory authority to perform this function.[6]

Second, the lead opinion omits to notice other important additions to the duties and responsibilities of a military judge that were not mere transfers from a president of a court-martial. For instance, prior to 1969, challenges for cause against a law officer or members of a court-martial were determined by the members collectively, *see* Arts. 41(a) and 51(b), UCMJ, 50 USC §§ 616(a) and 626(b) (1950), respectively, recodified as 10 USC §§ 841 (a) and 851(b) (1956), respectively; by contrast, after 1969, a military judge rules finally on all such challenges, *see* Art. 41(a) (1968). Additionally, as footnote 6 of the Chief Judge's opinion makes clear, Congress was aware of other important duties that were given to a military judge that, before, had not rested with any single official, *e.g.*, " 'to rule finally on certain procedural matters, such as motions for findings of not guilty, on which he now may be overruled by the court members who are untrained in the law,' " and " 'for pretrial and posttrial sessions to be held by the military judge without the presence of the court panel for the purpose of deciding procedural questions.' " In sum, the role of the military judge " 'will more closely approximate that of a civilian trial judge.' " *See* 114 Cong. Rec. 30564 (1968).

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[6] The plurality's effort to minimize the remarkable nature of this change, by referring to the long history of "one-member" *summary* courts-martial, is off the mark. After all, the Supreme Court has held that a summary court-martial is *not even a criminal proceeding*. *Middendorf v. Henry*, 425 U.S. 25, 36-42, 96 S.Ct. 1281, 1288-91, 47 L.Ed.2d 556 (1976).

That is an *Office*.[7] *See Freytag v. C.I.R.*, 501 U.S. at ——, 111 S.Ct. at 2640. It is an Office that involves a full range and collection of judicial functions and duties that, prior to 1969, did not repose in any other individual in the military justice system.[8] This factual analogy is

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[7] In determining this question of whether there is a distinct office, the lead opinion reflects significance in subtleties of wording of Articles 26 and 66, and, by comparison, 67, UCMJ, 10 USC §§ 826, 866, and 867, respectively. I simply make these observations about that exercise.

The Supreme Court in *Freytag v. C.I.R., supra*, 501 U.S. at ——, 111 S.Ct. at 2640, initially noted as a predicate that the office there was one "established by Law" and then followed the functional-duty approach and focused on the "duties and functions" delineated in the statute. As to whether Articles 26 and 66 as a predicate establish an office of military judge by law, a comparison of those provisions with the statutes in issue in *Freytag* ineluctably lead me to conclude that Articles 26 and 66 pass muster to do so. *Compare* 26 USC § 7443A-Special trial judges ("The chief judge [of the Tax Court] may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." § 7443A(a)), *with* Article 1(10), UCMJ, 10 USC § 801(10) ("'[M]ilitary judge' means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26)."); Article 26(b) ("A military judge shall be detailed to each general court-martial."); and Article 66(a) ("Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.")

That predicate established, however, the real heart of the test relates to the nature and quality of the funtcions and duties of military judges delineated by those provisions; that inquiry is more fully addressed in my opinion, *supra*.

[8] The lead opinion points out that some of the functions and responsibilities that, after 1969, rest with the military judge earlier had been those collectively of the members of a court-martial. Without charting here the source of each of a military judge's duties, suffice to say that some earlier had belonged to members; some earlier had belonged to the president of a court-martial; and some earlier were non-existent—they were reposited for the first time in the office of military judge. Accordingly, I rhetorically ask

consistent with the plain language of the UCMJ, which expressly defines the military judge as "an official." Art. 1(10) (1969).

At the appellate level, the functions and duties of military judges are similarly imposing. A Court of Military Review exercises "awesome, plenary . . . powers." *United States v. Cole*, 31 MJ 270, 272 (CMA 1990). It is charged in every case it considers to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact," and it may in a given case "affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c).

In other words, appellate military judges sitting on a Court of Military Review in each case hear and decide all *legal* issues arising from the proceedings below, satisfy themselves that the evidence is *factually* sufficient to sustain the findings, assure that the sentence is *legally* imposable, and determine anew whether the sentence is an *appropriate* one. In addition to these functions during the usual course of appellate review of a court-martial conviction, Courts of Military Review possess and have exercised extraordinary-writ powers where appropriate. *See Dettinger v. United States*, 7 MJ 216 (CMA 1979). *All* this is done without any second-guessing by any military superior and is subject to review only within the judicial system, by this Court.

By any view, in my opinion, the functions of military judges at the appellate level, like those of military judges at the trial level, are substantially "more than ministerial tasks"; rather, they reflect the exercise of "significant

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the plurality: Does the fact that some (even assuming *most*, for this purpose) of the responsibility and discretion that now is lodged in *one* source actually came from *several* various sources in any way change the equation as to whether that *one* source now is an "office" under the functional-duty approach, *see* n.5, *supra*?

discretion" as well as *final* judgment subject only to judicial review by a superior appellate court. *See Freytag v. C.I.R., supra,* 501 U.S. at ——, 111 S.Ct. at 2640. Just as surely as I said earlier about military judges at the trial level, these functions and duties of appellate military judges leave no doubt in my mind that Congress created an office of military judge.

III

Relying on *Shoemaker v. United States,* 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893), the plurality concludes that

> [a]ssuming, *arguendo,* that a new office was created at some time during the evolution of the military judge, the result is the same, because the duties of the military judge are the same as those traditionally performed by military officers serving as members of courts-martial. As such, they are germane to the duties of a legally trained military officer detailed as a military judge.

Thus, the plurality reasons, a new appointment is not required. 36 MJ at 246. I join the Chief Judge's reasoning in Part VI of his opinion that rejects both this reasoning and its reliance on *Shoemaker.*

Simply stated, *Shoemaker* was a situation in which the Supreme Court looked at the duties of two *particular,* high-level military engineers—the Chief of Engineers and the Engineer Commissioner for the District of Columbia —and concluded that the *additional* duties that Congress purported to give them as members of the Rock Creek Park Commission were germane to their particular offices, so that a second appointment was not necessary. That is a far cry from the extrapolation that the lead opinion now makes: That devolution of specific and highly responsible judicial duties as a military judge is "germane" to some nebulous notion of duties of "legally trained mili-

tary officers" in general. *Cf.* Criminal Law Note, *supra,* 36 MJ at 242. Analogizing in reverse back to *Shoemaker,* what the plurality affirms here would be akin to concluding that the responsible and discretionary functions and duties of the commissioners on the Rock Creek Park Commission were "germane" to duties of *any* military officer trained as an engineer. *Shoemaker* may not be read that broadly.

Finally, I view two significant provisions in the Uniform Code of Military Justice as contradicting the plurality's conclusion that duties of a military judge are germane to the duties of a military officer. First, as Articles 26(b) and 66(a) expressly require that a military judge at both the trial and appellate levels be "a member of the bar of a Federal court or . . . of the highest court of a State," military authorities do not have complete control over whether a military officer meets the statutory qualifications to be a military judge. Admission to the practice of law is controlled or regulated by state statute, court rule, or both, and requires comprehensive legal training not provided by the military and a determination of legal competence by the civilian authority. *See* 7 Am Jur 2d, Attorneys At Law § 12; American Bar Association, Comprehensive Guide to Bar Admission Requirements (1992-93). Because a service-member's admission to the independent bar by civilian authority is a statutory qualification for a military judge, I cannot conclude that duties of a military judge are germane to the general duties of a military officer, even a "legally trained" one.

Second, as the lead opinion acknowledges, Article 66(a) authorizes appointment of *civilians* as appellate military judges on the Court of Military Review. The plurality purports to preclude the difficulty that this statutory provision creates with its germaneness theory, but it cannot be evaded. Whether civilians sat as judges in this case is not the point; rather, the pertinent inquiry is: What impact does this statutory authorization have on the inter-

pretation of that statute as a whole relevant to whether the duties and functions of an appellate military judge are "germane" to duties generally of a military officer, even one "legally trained"? The express statutory provision for civilians on the appellate court is inconsistent with the plurality's germaneness theory. The plurality disregards this inconsistency; I cannot do so.

CONCLUSION

In summary, I conclude that Congress is not exempt from the strictures of the Appointments Clause of Article II, § 2, clause 2 of the Constitution when it exercises its powers under Article I, § 8, clause 14 of the Constitution to regulate the land and naval forces. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612. Considering the functions and duties of military judges, I conclude that Congress established a distinct office of military judge in Articles 26 and 66 of the Uniform Code of Military Justice, so the Appointments Clause must be complied with in filling that office. *See Freytag v. C.I.R.*, 501 U.S. ——, 111 S.Ct. 2631. Finally, I conclude that a prior general appointment as a military officer will not satisfy the Appointments Clause in this regard because the specific judicial duties required of the office of military judge—as opposed to duty as a military officer—are not "germane" to duties of a "legally trained" military officer in general. *See Shoemaker v. United States*, 147 U.S. 282, 13 S.Ct. 361.

Because a majority of this Court on the other hand, is of the view that the present method of appointing military judges meets constitutional requirements, I need not decide whether these appointments can be affirmed under the *de facto*-appointee rationale of *Buckley*, as discussed by the Chief Judge. 36 MJ at 256-257. I point out,

though, that even that rationale has certain logical and legal limitations.[9]

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[9] The Chief Judge touches on some of these issues in Part VIII of his opinion in which he suggests the possibility of interim Presidential direction on appointments through the Secretary of Defense. In addition, the appropriate time for effecting statutory remedial action would be at issue. For instance, in implementing the *de facto*-appointee rationale in *Buckley v. Valeo, supra*, 424 U.S. at 142-43, 96 S.Ct. at 693, the Supreme Court stayed its judgment for a period of 30 days to afford Congress an opportunity to reconstitute the Federal Election Commission and, in the interim, allowed the commission to function *de facto*. Also, by analogy, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), which involved a jurisdictional void created by a ruling that a system of bankruptcy courts was unconstitutional, the Supreme Court delayed its mandate for several months to permit Congress an opportunity to implement remedial action. After the initial delay, 458 U.S. at 88, 102 S.Ct. at 2880, the Court granted a further delay of some 2½ months. 459 U.S. 813, 103 S.Ct. 199, 74 L.Ed.2d 160 (1982). *Cf. United States v. Matthews*, 16 MJ 354 (CMA 1983) (in decision finding court-martial death-penalty sentencing procedures unconstitutional, mandate withheld for 90 days to allow opportunity to change those procedures in time for appellant's resentencing).

APPENDIX B

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

J. A. FREYER R. A. STRICKLAND JAMES E. ORR

UNITED STATES

v.

ERIC A. WEISS, 080 62 5296
Private (E-1), U. S. Marine Corps Reserve

NMCM 89 4189 Decided 31 January 1992

Sentence adjudged 19 September 1989. Military Judge: E. F. Pesik Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Schools Battalion, Marine Corps Communication-Electronics School, MCAGCC, Twentynine Palms, A 92278-5020.

LT ROBERT E. WALLACE, JAGC, USNR, Appellate Defense Counsel.

LT MARY ANNE RAZIM, JAGC, USNR, Appellate Defense Counsel.

LCDR LAWRENCE W. MUSCHAMP, JAGC, USN, Appellate Government Counsel.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 68,432
NMCM 91-2766

UNITED STATES,
Appellee

v.

ADRIAN A. RICE, PRIVATE FIRST CLASS
U.S. MARINE CORPS,
Appellant

Submitted Nov. 17, 1992

Decided Jan. 15, 1993

For Appellant: *Lieutenant James R. Crisfield, Jr.*, JAGC, USNR.

For Appellee: *Colonel T. G. Hess*, USMC and *Captain Laurie S. Powell*, USMC.

PER CURIAM:

This case is one of more than 200 cases now pending before this Court wherein an appellant has challenged the trial and appellate military judges who took action in his case because they were not appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2, and the decision of the United States Supreme Court in *Freytag v. Commissioner of Internal Revenue*, —— U.S. ——, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). This Court has

resolved this same issue in the Government's favor in *United States v. Weiss*, 36 MJ 224 (CMA 1992). The mandate in that case was issued on January 6, 1993. In accordance with this Court's practice and in the interest of judicial economy, we will deny all petitions for review based solely on this issue when the petition supplement has been filed after the date of the mandate.

We further note the prevalence of the issue in previously granted cases and the possibility for further review by the United States Supreme Court. If certiorari is granted by the Supreme Court and some relief is afforded in those cases, this Court will accept out-of-time requests for appropriate relief in cases where the above denial orders have been issued.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

APPENDIX D

U.S. COURT OF MILITARY APPEALS

No. 68,050

CMR No. 28899

UNITED STATES,

Appellee,

v.

DARRICK B. LEIKER, Airman First Class,

Appellant.

Argued April 8, 1993

Decided Sept. 10, 1993

For Appellant: *Captain Gilbert J. Andia, Jr.* (argued); *Colonel Terry J. Woodhouse* (on brief); *Major Alice M. Kottmyer* and *Captain Richard W. Aldrich.*

For Appellee: *Captain Carlos L. McDade* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffrey T. Infelise* (on brief); *Major John H. Kongable, Major Ann M. Mittermeyer, Major Jeffrey C. Lindquist, Major Paul H. Blackwell, Jr., Karen L. Davis,* Legal Intern.

Opinion of the Court

CRAWFORD, Judge:

Appellant was convicted by general court-martial of vandalizing military property and conspiracy, in violation of Articles 108 and 81, Uniform Code of Military Jus-

tice, 10 USC §§ 908 and 881, respectively. He was sentenced to a bad-conduct discharge, 10 months' confinement, a partial forfeiture, and reduction to the lowest enlisted grade. The convening authority reduced the confinement and forfeiture but otherwise approved the sentence as adjudged. The Court of Military Review affirmed the findings and sentence. We granted review on the following issue:*

> WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR COMPELLED TESTIMONY.

For the reasons discussed herein we hold there was no error and affirm the decision of the Court of Military Review.

FACTS

During an investigation into a series of break-ins and acts of vandalism, agents of the Air Force Office of Special Investigations (OSI) found physical evidence consisting of three Vantage cigarette butts, two sets of footprints, and several empty beer cans. They also learned that a phone call had been made from one of the crime scenes to appellant's home.

Thereafter, they asked appellant, a security policeman, to report to the OSI office for questioning as a possible witness who could identify the person who had placed the phone call. Appellant was not initially advised of his rights under Article 31(b), UCMJ, 10 USC § 831(b).

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* We also granted review on the tenure and Appointments Clause issues. Since the grant of review in this case, this Court held against appellant's position on both issues in *United States v. Graf*, 35 MJ 450 (CMA 1992), *cert. granted sub nom. Weiss v. United States, infra*, and *United States v. Carpenter*, 37 MJ 291 (CMA 1993), respectively. *See also United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, —— U.S. ——, 113 S.Ct. 2412, 124 L.Ed.2d 635 (1993).

During questioning by Special Agent Charles F. Roseberry, Jr., and Special Agent Gregg Fina, appellant revealed that he was out in the early morning with Staff Sergeant Mark A. Waldschmidt, who smoked Vantage cigarettes. Realizing appellant might be involved in the crimes, Agent Roseberry read him his rights, and the interview terminated after appellant invoked his rights.

Prior to entry of his pleas, appellant moved to suppress his initial statements to Special Agent Roseberry. The basis for the motion was that appellant's statement was obtained in violation of Article 31(b). The motion was denied.

At the suppression hearing appellant contended that Special Agent Roseberry "believed or reasonably should have believed" appellant to be a suspect prior to the rights warning. *United States v. Morris,* 13 MJ 297, 298 (CMA 1982), citing *United States v. Anglin,* 18 USCMA 520, 523-24, 40 CMR 232, 235-36, 1969 WL 6053 (1969). Special Agent Roseberry testified that he did not consider appellant a suspect at the time of the first interview.

Appellant urges that a close examination of the interview techniques used by Special Agent Roseberry reveals appellant was treated and questioned as a suspect and not as a witness. In effect, appellant argues that Special Agent Roseberry's actions speak louder than words in showing appellant's actual status at this interview. Specifically, appellant points to two techniquise allegedly used by Special Agent Roseberry: questioning regarding nervousness and use of good guy/bad guy technique. Appellant argues before this Court that the military judge erred by not compelling Special Agent Roseberry to answer defense counsel's questions regarding use of these techniques in questioning appellant.

DISCUSSION

The defense has the constitutional right to introduce relevant and reliable evidence. In *United States v. Hayes,* 36 MJ 361, 362 (CMA 1993), this Court stated:

> The Compulsory Process Clause, *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973), and the Due Process Clause, *Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), provide criminal defendants the right to introduce evidence and the right to examine defense witnesses at trial to allow "the jury . . . [to] decide where the truth lies." *See Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct.1920, 1923, 18 L.Ed.2d 1019 (1967). The extent of the right to present defense evidence is unsettled. *Cf. Pennsylvania v. Ritchie,* 480 U.S. at 56, 107 S.Ct. at 1000.

It is logically relevant to ask an agent what techniques were used to determine whether the individual was a suspect and whether there was a voluntary statement. The texts and the manuals used by law enforcement agencies list numerous techniques that might be employed to obtain confessions. *See, e.g.,* F. Inbau & J. Reid, *Criminal Interrogation and Confessions* (1962), cited in *Miranda v. Arizona,* 384 U.S. 436, 452, 86 S.Ct. 1602, 1616, 16 L.Ed.2d 694 (1966). One of the techniques specifically mentioned in *Miranda* is the "friendly/unfriendly" or the "Mutt and Jeff" act. *Miranda v. Arizona, supra,* at 452, 86 S.Ct. 1616. The *Miranda* rules were issued to counter-balance the psychological ploys used by police officials to obtain confessions.

An accused has the right to present evidence at trial about what interrogation techniques were used in order to prove that he was questioned as a suspect rather than as a witness or to establish involuntariness of a statement. *See Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142,

90 L.Ed.2d 636 (1986) (excluding testimony concerning taking of the confession violated defendant's Sixth Amendment rights). Theoretically, at least, techniques used to wear down resistance and to obtain confessions, would not be used by law enforcement agents unless questioning suspects.

However, in this case the questions regarding use of techniques for which appellant sought to compel answers were in fact answered by Special Agent Roseberry during his cross-examination. As to the questioning of appellant regarding his nervousness, the cross-examination of Special Agent Roseberry was as follows:

> Q: Isn't it true that one of the things you said to him is, "You haven't done anything wrong. Why are you nervous?"
>
> A: Yes.
>
> Q: Isn't that one of the common techniques that OSI use when they believe that they have someone who's hiding and covering up? Isn't that one of the questions that you are taught to ask?
>
> A: I cannot divulge techniquest of the OSI.
>
> Q: Isn't that one of the questions that you are taught to ask when you're interrogating a suspect?
>
> A: No, not really.
>
> Q: Isn't going on the nervousness, seeing the nervousness, pouncing on the nervousness, trying to exploit that to overcome the will, isn't that one of the techniques that you're taught?
>
> A: He was not a suspect. He was a witness who was nervous.
>
> Q: When you see nervousness, isn't it true that as an OSI agent, you are taught to exploit that nervousness and go in and try to get answers out of them?
>
> A: You try to get them to give you answers, yes, but I was not trying to exploit him.

Q: And isn't it true that when you say, "You haven't done anything wrong. Why are you nervous?", that's nothing more than technique to get an admission out of an individual?

A: I was trying to get a response. . . .

* * * *

Q: Now listen to my question. Isn't it true that one of the techniques that OSI use to get admissions from people is saying to them, "You haven't done anything wrong. Why are you nervous?"

A: I'm not calling it a technique. You are calling it a technique. It is not a technique of the OSI.

Q: Isn't that one of the things that you're taught?

A: I used that particular phrase to solicit a response from Airman Leiker. He was nervous. I was trying to calm him down.

Also, as to the good guy/bad guy technique, Mr. Roseberry testified that he would not refer to it as a technique but testified he "did not" use such a tactic. The questioning was as follows:

Q: Isn't it true that one of the techniques that as an OSI agent you are taught to use to elicit admissions is a good guy/bad guy technique?

A: I will not discuss techniques.

MJ: I don't even really see the relevancy of that, counsel.

DC: It shows whether or not he's considered a suspect. He's made lots of statements that say that he's not considering him a suspect, but the techniques that they use in questioning an individual show whether, in fact, they are considering, maybe subconsciously, the person to be a witness. They don't use the good guy/bad guy technique. . . .

BJ: I don't think the witness has testified that that's a technique used in any particular way.

DC: Well he's refused to comment on techniques. That's what I would like to have you. . . .

MJ: No, I won't allow that question. I won't require that be answered.

Q: Didn't you try this good guy/bad guy to get him to make statements?

A: Again, you're asking for me to solicit and answer technique.

MJ: Now I'll allow that question. You can answer that question. Did you use this technique?

A: No, we did not.

The techniques used to interrogate appellant were relevant to determine whether his statement was voluntary and whether he was a suspect at the time of questioning. Information about interrogation techniques in general may have some relevance, but upon objection, counsel must make a proffer as to the relevance of general techniques to appellant. Mil.R.Evid. 103(a)(2), Manual for Courts-Martial, United States, 1984. Based on the proffer, the military judge can weigh the probative value against the possibility of undue delay or a waste of time. Mil.R.Evid. 403.

In this case the military judge required the OSI agent to answer questions about techniques actually used to interrogate appellant. He declined to compel the agent to provide marginally relevant information about general interrogation techniques. We hold that the military judge did not abuse his discretion by limiting questioning to those techniques used to interrogate appellant.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX E

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28899

UNITED STATES

v.

AIRMAN FIRST CLASS DARRICK B. LEIKER,
FR511-88-9524 UNITED STATES AIR FORCE

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19 March 1992

Sentence adjudged 11 July 1990 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Stark O. Sanders (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months (any portion of the confinement remaining after 18 December 1990 was remitted), forfeiture of $100 per month for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Captain Richard W. Aldrich.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, and Major Ann M. Mittermeyer.

Before

HODGSON, McLAUTHLIN, and JAMES
Appellate Military Judges

OPINION OF THE COURT

HODGSON, Senior Judge:

Contrary to his pleas,[1] Airman First Class Leiker was convicted in a bench trial of conspiring to damage government property, damaging military property of the United States, damaging private property, larceny of military property, housebreaking, and unlawful entry. The approved sentence extends to a bad-conduct discharge, 8 months confinement, forfeiture of $100 pay per month for 8 months, and reduction to E-1.[2] We find no prejudicial error and affirm.

FACTS

Sometime between 1630, 27 December 1989, and 0730 the next morning, Buildings 7232 and 7237 on Dyess Air Force Base, Texas were entered and various government and private offices were "trashed." Examination of the crime scene disclosed two distinctive shoe prints and Vantage brand cigarettes butts. The investigation also disclosed that a phone call was made at 0139, 28 December 1989, from Building 7237 to the appellant's off-base residence.

Law enforcement investigators initially considered the appellant to be a possible witness and questioned him as to who had called him the night of 28 December. The appellant denied knowing who vandalized the buildings and said he spent the evening with Staff Sergeant Mark Waldschmidt and was not home at the time of the phone

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[1] At the close of the providency inquiry the military judge refused to accept the appellant's guilty plea to some of the allegations. Therefore, the government withdrew from the accepted pretrial agreement, and the appellant entered a not guilty plea to all charges and specifications.

[2] The convening authority, later remitted any confinement remaining after 18 December 1990.

call. The appellant also indicated that Waldschmidt smoked, but was uncertain as to the brand.

During a break in the interview, the investigators ascertained that Waldschmidt smoked Vantage cigarettes. When the interview resumed, the appellant was given Article 31(b) warnings and informed of his right to counsel. The appellant asked to speak with a lawyer, and the interview was terminated.

Staff Sergeant Waldschmidt was later questioned and admitted his involvement in the vandalism. He identified the appellant as the other participant. He testified for the prosecution at the appellant's trial.

The appellant acknowledged taking part in the vandalism, but claimed he was drunk and Waldschmidt "pressured" him into drinking and "trashing" the offices.

RECUSAL OF MILITARY JUDGE

The original trial judge recused himself after both parties withdrew from the pretrial agreement and the appellant appeared hesitant to admit his guilt. He did this to "remove any possible perception that my impartiality . . . might be questioned and to provide the accused with a full and unfettered opportunity to elect his desired trial forum . . . ."

Appellate defense counsel now argue that the first judge's action "specifically denied the appellant his previously approved choice" as to who would hear the case.

This assigned error is without merit. An accused is not entitled to a specific judge, but only to one that is fair and impartial. *United States v. Berman,* 28 M.J. 615 (A.F.C.M.R. 1988); *cf. United States v. Mansfield,* 33 M.J. 972 (A.F.C.M.R. 1991) (accused not entitled to a specific convening authority to act on his record of trial). He is, of course, entitled to know who the judge is before

he elects the trial forum, *see* R.C.M. 903(c)(2)(A), but he cannot chose a different judge.

A military judge's decision on recusal is reviewed on appeal for abuse of discretion standard. *United States v. Elzy*, 25 M.J. 416 (C.M.A. 1988). We find no such abuse here.

SUPPRESSION MOTION

The appellant contends that he was a suspect before his interview by law enforcement agents began on 2 January 1990. Accordingly, he should have been given the proper warnings and told of his right to counsel at the outset of the questioning. Since he was not warned, his statement identifying Waldschmidt as his companion the evening of 27 December, together with derivative trial testimony of Waldschmidt, should have been suppressed and the trial judge erred in failing to do so. *See generally United States v. Spaulding,* 29 M.J. 156 (C.M.A. 1989).

In denying the suppression motion, the trial judge made detailed factual findings in which he concluded the appellant was not a suspect when the initial interview began on 2 January and only became one later in the questioning, at which time he was properly advised. An appellate court should, of course, give due deference to the trial bench's determination of fact, and such findings should not be disturbed unless unsupported by the evidence or is clearly erroneous. *United States v. Burris,* 21 M.J. 140 (C.M.A. 1985).

The test in determining if a person is a suspect is whether, "[c]onsidering all the facts and circumstances at the time of the interview, the government interrogator believed or reasonably should have believed that the one interrogated committed an offense." *United States v. Morris,* 13 M.J. 297, 298 (C.M.A. 1982). Further, an overly suspicious thought that a witness in an investigation might have been involved does not trigger the warn-

ing requirement of Article 31(b). *United States v. Poole*, 15 M.J. 883 (A.C.M.R. 1990).

Applying the above criteria to the circumstances facing the law enforcement agents beginning their interview of the appellant, we find no reason to overturn the trial court's determination that the appellant was not a suspect at the outset of the questioning. The suppression motion was properly denied. *But cf. United States v. Kramer*, 30 M.J. 806 (A.F.C.M.R. 1990).

COMPELLING TESTIMONY

Without citing any supporting authority, the appellant claims the trial judge erred in not compelling the interviewing police officer to answer questions on cross-examination concerning law enforcement interrogation techniques. The judge allowed trial defense counsel to delve into this area but quickly concluded that this line of questioning was not relevant. The interviewer's interrogation techniques had no bearing on whether the appellant was a suspect at the beginning of the questioning. The inquiry was a "fishing expedition" with no relevancy to any issue before the court.

A trial judge has broad discretion to limit cross-examination on collateral matters. We find no error in his doing so in this case. R.C.M. 801(a)(3); Mil. R. Evid. 61(a). *See generally United States v. Brown*, 13 U.S.C.M.A. 485, 33 C.M.R. 17 (1963).

MILITARY PROPERTY

Citing *United States v. Ford*, 30 M.J. 871 (A.F.C.M.R. 1990) and *United States v. Thomas*, 31 M.J. 794 (A.F.C.M.R. 1990), appellate defense counsel suggest that "a trophy figurine, two Merlin phones, an 'office table,' and a filing cabinet," all housed in the Morale, Welfare, and Recreation (MWR) Building cannot be classified as "military property" since MWR receives "a

large portion of its funding from non-appropriated funds." The items described above were among those alleged to have been damaged by the appellant.

Appellant defense counsel urge that the *Ford* and *Thomas* decisions imply that "military property" is only that which is purchased by appropriated funds. Ergo, MWR property can never be "military property."

This assigned error fails for two reasons. First, neither *Ford* nor *Thomas* hold that the status of the funds controls what constitutes "military property." To the contrary, one of the concurring opinions in *Ford* states, "[That the source of the funds] as appropriated or non-appropriated . . . is immaterial, and a nexus must exist between the property alleged as military in nature and its intended use by the military." *Ford,* 30 M.J. at 875. "Military property" is defined in the Manual for Courts-Martial as "all property, real or personal, owned, held, or used by one of the armed forces of the United States." MCM 1984, Part IV, para. 32c(1). *See* Ford 30 M.J. at 872. No part of the *Ford* decision, majority, concurring or dissent, or any of the *Thomas* decision holds that *only* property purchased with appropriated funds is "military property." *See also United States v. Clarke,* ACM 28301, 20 August 1991.

Second, and more to the point, the parties at trial stipulated that the challenged items were "military property." Such a stipulation of fact when admitted at trial with the consent of the accused, substitutes for proof. *Unied States v. Williams,* 30 C.M.R. 650 (N.B.R. 1960).

SUFFICIENCY OF THE EVIDENCE

Appellate defense counsel suggest that the evidence is not factually sufficient to establish the appellant's guilt beyond a reasonable doubt. We disagree. The appellant's accomplice and co-conspirator, Staff Sergeant Waldschmidt, testified at length concerning the "trashing" of

Buildings 7232 and 7237. The appellant admitted being present and taking part in the destruction but maintained he had been "pressured" by Waldschmidt into drinking and participating in the havoc that followed. He raised the defense of duress, and showed that he was just following the lead of one who was senior to him.

The standard for factual sufficiency is whether, after weighing the evidence in the record and making allowance for not having personally seen the witnesses, we are convinced of the accused's guilt beyond a reasonable doubt. *United States v. Pearson,* 33 M.J. 913 (A.F.C.M.R. 1991). Applying the above standard, we are independently convinced beyond a reasonable doubt of the appellant's guilt. Article 66(c), UCMJ. For the reasons stated, the findings of guilty and the sentence are

AFFIRMED.

Judges McLAUTHLIN and JAMES concur.

[SEAL]

OFFICIAL

/s/ Pamela D. Stevenson
PAMELA D. STEVENSON
Captain, USAF
Chief Commissioner

APPENDIX F

UNITED STATES COURT OF MILITARY APPEALS

No. 67,886

CMR No. 28441

UNITED STATES,

Appellee

v.

GLENN F. ACTON, Staff Sergeant
U.S. Air Force,

Appellant

Argued June 2, 1993

Decided Sep. 28, 1993

Counsel

For Appellant: *Major George F. May* (argued); *Roger Besu* and *Lieutenant Colonel Frank J. Spinner* (on brief); *Colonel Terry J. Woodhouse, Major Marilyn A. Gordon, Major Alice M. Kottmyer, Major Mary C. Yastishock.*

For Appellee: *Captain Carlos L. McDade* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Major Paul H. Blackwell, Jr.*

Military Judges: Mildred L. Raichle, Mark D. Breidenbach (rehearing), Wade Morrison (DuBay hearing).

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members convicted appellant, pursuant to his pleas, of presenting a false claim, in violation of Article 132, UCMJ, 10 USC § 932. The court-martial also convicted appellant, contrary to his pleas, of committing an indecent act with his 12-year-old daughter by sucking her breast and inserting his finger into her vagina, in violation of Article 134, UCMJ, 10 USC § 934. The court-martial sentenced appellant to a dishonorable discharge, confinement for 3 years, total forfeitures, and reduction to the lowest enlisted grade. Because of an error during the sentencing proceedings, the convening authority ordered a sentencing rehearing, at which appellant, represented by a new defense counsel, received the same sentence as before. The convening authority approved that sentence on March 16, 1990.

The Court of Military Review remanded the case for further factfinding on the question whether appellant's first defense counsel had been properly released from representing appellant at the sentencing rehearing. 33 MJ 536. On further review, the Court of Military Review held that appellant had consented to the withdrawal of his first defense counsel and affirmed the findings and sentence in an unpublished opinion dated December 31, 1991.

We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, WHEN SHE ADMITTED, PURSUANT TO MIL. R. EVID. 404(b), EVIDENCE THAT APPELLANT HAD SHOWERED WITH HIS CHILDREN AND SHOWN THEM SEXUALLY EXPLICIT VIDEO TAPES.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED WHEN IT DECIDED THAT APPELLANT CONSENTED TO THE WITHDRAWAL OF CAPTAIN BARTLEMAY AS HIS DETAILED DEFENSE COUNSEL.

I. *Evidence of Showering and Pornographic Videos*

A. *Factual Background*

Prior to entering his pleas, appellant made a motion in limine to exclude any evidence that he showered with his son and daughter or showed them pornographic movies. Trial counsel argued that the evidence was admissible "to show a common scheme, intent, or plan . . . to molest his daughter"; that the showering and pornographic movies were "foreplay" to the indecent act; and that appellant "was conditioning the child to have sexual activity with him." The military judge asked counsel if they believed the evidence was admissible as "res gestae" or "a continuing course of conduct." Defense counsel answered in the negative and trial counsel had no comment.

After an overnight recess during which the military judge stated that she would read *United States v. Mann*, 26 MJ 1 (CMA), *cert. denied*, 488 U.S. 824 (1988), which involved a charge of indecent acts by a father with his daughter and admissibility of magazines depicting father-daughter sexual conduct, the military judge in the instant case ruled that the evidence would be admitted to show "a continuous course of conduct" and to prove "plan" and "intent."

Trial counsel intended to show only about 15 minutes of the video, but defense counsel argued that, if the video was to be shown at all in spite of the defense objection, then more should be shown "to depict an accurate presentation of what was shown, rather than just concentrate

on the one involving incest. . . ." The military judge requested counsel to attempt to reach an agreement on how much of the video should be shown. Eventually, counsel agreed on a 24-minute extract of the video.

The prosecution's case consisted of the testimony of appellant's daughter (the victim), appellant's son, and a civilian police detective who obtained a confession from appellant. The daughter testified that she, her brother and her father had watched the video depicting incest four or five times. On the night in question, they watched the video; then took a shower together. Appellant's son asked appellant if they could sleep in appellant's bedroom where it was warmer. The three slept in the same bed, with appellant in the middle. At about two o'clock in the morning appellant whispered his daughter's name several times and asked he, "Do you want to feel good?" She responded, "I don't know." Appellant then "started sucking" her breast and "using his fingers in" her vagina. She said "Stop, because I have to go to the bathroom." After both appellant and the daughter used the bathroom, appellant asked his daghter if she wanted to do it again, and she responded, "No" and went to sleep.

Appellant's son, who was 11 years old at the time, corroborated his sister's description of the showers and pornographic movies.

In his confession to the civilian police detective, appellant admitted asking his daughter "if she wanted to feel good." He admitted sucking her breast and inserting his finger in her vagina. He stated, "I don't remember exactly what I said but it was something about orgasm." He admitted that he began showering with his children and showing them pornographic movies about a month before the charged offense. The last paragraph of his confession recites, "I don't see my daughter in a sexual way and I just wanted to educate my children."

A 24-minute extract of the pornographic video was shown to the members, depicting father-daughter sexual intercourse, brother-sister intercourse, and a closing scene in which the "mother" enters the room while father and daughter are engaged in sexual intercourse. The "mother" kisses the "father," while he continues to have intercourse with the "daughter," after which both "mother" and "daughter" perform fellatio on the "father."

The defense consisted of an attack on the daughter's credibility and an attack on the reliability of appellant's confession. The defense introduced evidence that the daughter was untruthful and sexually promiscuous. Regarding the confession, the defense asserted that the confession was an inaccurate and untruthful statement made by an "emotionally distraught" and confused appellant. Appellant did not testify.

In her instructions on findings, the military judge included the following:

> Evidence that the accused showered with his children and showed them the video tape that was viewed in court may be considered by you for the limited purpose of its tendency, if any, to explain the circumstances surrounding the offense and the tendency, if any, to prove the intent of the accused to arouse his sexual desires. You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that he, therefore, committed the offense charged.

Neither counsel objected to the instructions or requested additional instructions.

B. *Discussion*

Appellant contends that the military judge erred by admitting evidence that appellant showered with his daughter and son and showed them pornographic videos.

The question on appellate review is whether the military judge abused her discretion by admitting the evidence in question. *United States v. Spata,* 34 MJ 284, 286 (CMA 1992). We hold that she did not.

Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984, provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The categories of admissible evidence listed in Mil.R. Evid. 404(b) are illustrative; it is not necessary that "evidence fit snugly into a pigeon hole provided by Mil. R.Evid 404(b)." The test is "whether the evidence . . . is offered for some purpose other than to demonstrate the accused's predisposition to crime and thereby to suggest that the factfinder infer that he is guilty, as charged, because he is predisposed to commit similar offenses." *United States v. Castillo,* 29 MJ 145, 150 (CMA 1989).

In *United States v. Reynolds,* 29 MJ 105, 109 (CMA 1989), we set out a three-part test for determining admissibility of "404(b)" evidence:

> 1. Does the evidence reasonably support a finding by the court members that appellant committed prior crimes, wrongs or acts?
>
> 2. What "fact . . . of consequence" is made "more" or "less probable" by the existence of this evidence?
>
> 3. Is the "probative value . . . substantially outweighed by the danger of unfair prejudice"?

(Citations omitted.)

The first prong is founded on Mil.R.Evid. 104(b), dealing with relevance conditioned on a fact. The threshold for this prong of admissibility is low. *See United States v. Dorsey,* No. 68,244, — MJ at *(7)* (CMA 1993). As the Supreme Court explained in *Huddleston v. United States,* 485 U.S. 681, 690 (1988):

> In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

This prong was clearly established in this case. Appellant's daughter and son both testified that appellant took showers with them and showed them pornographic videos. Appellant's own confession admitted the acts.

The second prong—determining the "fact . . . of consequence" made "more" or "less probable," *i.e.,* relevance, is the heart of the controversy here. The defense in this case was mixed. Although they presented no direct evidence on the merits, they attacked the credibility of the government witnesses and asserted in argument that the offenses did not occur. They did not attack admissibility of appellant's confession but asserted that it was an unreliable statement made by an emotionally distraught and confused suspect. Finally, within the four corners of the confession appellant admitted showering with his children and showing them pornographic videos, but he asserted that his sole motivation was educational and he disclaimed any sexual interest in his daughter.

Given this posture of the evidence, we hold that the evidence satisfied the second prong because it was rele-

vant to prove appellant's plan or scheme to condition his daughter to accept his sexual advances as permissible and normal. *See United States v. Palmer,* 29 MJ 929, 938 n. 5 (AFCMR 1989) (evidence of pornographic movies relevant to show appellant's effort to "brainwash" victim into accepting sexual abuse), *aff'd,* 33 MJ 7 (CMA 1991). It also was relevant to prove appellant's intent to satisfy his sexual desires, because it refuted appellant's assertion in his confession that his intent was innocent and that he had no sexual interest in this daughter. *See United States v. Mann,* 26 MJ at 4 (evidence of pornographic materials admitted when accused denied acts occurred and also asserted innocent bathing and tickling).

The third prong incorporates the balancing test of Mil. R.Evid. 403. In appellant's case the probative value of the evidence was high on the issues of plan and intent. Appellant's conduct was close in time to the charged offense, the last incident taking place on the evening before the charged offense occurred shortly after that midnight. Any prejudicial impact based on the shocking nature of the evidence was diminished by the fact the same conduct was already before the court members, having been described in appellant's confession which was received in evidence without defense objection. Trial counsel presented only enough of the video to establish that it portrayed incest as normal. The additional portions of the pornographic video were played at the request of the defense.

Appellant argues that we should give minimal deference to the judge in this case because she did not articulate her application of the Mil.R.Evid. 403 balancing test on the record. It is certainly preferable in most cases for the military judge to articulate findings on the record so that we can determine how Mil.R.Evid. 403 was applied. Obviously, it is difficult to defer to a decision when the record does not reflect what the basis of the decision was.

Nevertheless, although we have encouraged military judges to make special findings which articulate the rationale for their rulings, we have not required them to do so. *See United States v. Palmer, supra.*

In any event, it is not difficult to discern the basis of the military judge's ruling in this case. Trial counsel offered the evidence on multiple theories: that it showed 'common scheme, intent, or plan . . . to molest his daughter"; that it was "foreplay"; and that appellant "was conditioning the child to have sexual activity with him." The miiltary judge queried counsel for both sides about 'res gestae" and "continuing course of conduct." —— MJ at *(4)*. After recessing overnight to study *United States v. Mann, supra*, which also involved sexual misconduct with a child, a general denial, and an asserted innocent intent, the military judge admitted the evidence as relevant to "a continuous course of conduct," "plan," and "intent."[1] Since the military judge expressly relied on *Mann*, which applied the Mil.R.Evid. 403 balancing test, we are satisfied that she exercised her discretion in accordance with the legal principles set out in *Mann*. Accordingly, we hold that the military judge did not abuse her discretion in admitting this evidence.

We have also noted that the trial of this case preceded our recommendation in *United States v. Franklin*, 35 MJ 311, 317 (CMA 1992), to 'wait until both parties present evidence on the merits" to determine whether intent is contested. Our guidance in *Franklin* was prophylactic, designed to avoid premature admission of evidence which

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[1] As Senior Judge Everett correctly notes, the suggestion that appellant and his children sleep in the same bed on the night in question came from appellant's son, not from appellant. This evidence is not "totally at odds" with the military judge's theory of admissibility. Appellant's "course of conduct" and "plan" were to take liberties with his daughter whenever the opportunity presented itself. The child's request presented such an opportunity.

later turns out to have little probative value but high prejudicial impact. *See* Mil.R.Evid. 403. In appellant's case, however, the military judge's failure to defer her ruling was harmless for two reasons: First, the evidence ultimately raised the issue of intent. Second, the evidence was clearly admissible to prove appellant's plan to condition his daughter to accept sexual abuse.

II. *Improper Withdrawal of Defense Counsel*

A. *Factual Background*

Appellant was convicted and sentenced on July 15, 1989. On July 20, 1989, appellant wrote a letter to his defense counsel, Captain Bartlemay, asking him to "petition for a Deferment of" confinement and "a new trial." Appellant then wrote:

> I feel I was not defended to the utmost of your ability, by not bringing pertinent evidence out. Also the legal issues here severly [sic] hindered your putting on a proper defense. If you feel you cannot or don't want to defend me again, I would very much appreciate you finding a good lawyer that can give me a good defense.

On the following day Captain Bartlemay responded to appellant as follows:

> Based on the concerns you expressed about the defense provided at trial and that you do not believe I did my best, I am withdrawing from further representation in post-trial matters. I have obtained the services of Captain Floyd Russel [sic] to represent you in all pot [sic] trial matters including the submission of clemency materials to the Convening Authority.

Captain Russell thereafter performed all post-trial defense counsel duties. In August 1989 appellant submitted a

lengthy request for clemency in which he complained about the failure of his defense counsel to "perform to his utmost to prove my innocence." On September 20, 1989, Captain Russell responded to the staff judge advocate's post-trial recommendation by requesting clemency and requesting a rehearing on findings, citing a number of alleged deficiencies in Captain Bartlemay's performance at trial. He also requested a rehearing on sentence. On October 2, 1989, the convening authority ordered a sentence rehearing. A rehearing was conducted on December 14-15, 1989. Captain Russell represented appellant at the rehearing, where the military judge advised appellant of his rights to counsel. He asked appellant, "Since you're here today with Captain Russell, am I correct in assuming that you wish to be represented by him?" Appellant responded, "Yes, sir." Captain Bartlemay's name was not mentioned by anyone.

On July 2, 1991, the Court of Military Review ordered a limited hearing in accordance with *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967), to determine whether appellant "consent[ed] to the withdrawal" of Captain Bartlemay; whether Captain Bartlemay "secure[d] his release from any appropriate judicial authority"; and if not, whether "there was any other good cause to sever the . . . relationship" between appellant and Captain Bartlemay. 33 MJ at 538.

At the *DuBay* hearing appellant (then represented by Captain Wood only) testified that he felt somewhat "relieved" when Captain Bartlemay withdrew, but that he did not agree with Captain Bartlemay's withdrawal. Appellant did not "ask" Captain Bartlemay "to continue as [his] counsel" because, in his words, "I wasn't aware that I could, Sir. Because he withdrew.' Appellant testified that he would "have preferred Captain Bartlemay to remain on the case and" assist Captain Russell but was

unaware that only he or a judge could release his defense counsel.

Captain Bartlemay testified at the *DuBay* hearing as follows:

> Q. All right. The Appellant, Airman Acton said that he never contacted you again concerning your representation of him following this 21 July letter. Is that true?
>
> A. There was one other contact that Sergeant Acton and I had in regard to the representation, Your Honor.
>
> Q. When did that take place?
>
> A. I'm not sure exactly when it did. It was after Captain Rusell got involved in the case, and he was also present during this meeting. In fact, he was the one that asked for us to all get together, and in fact, Captain Russell was interested in having me on the case to assist him at that time. And, that was the purpose to see whether or not Sergeant Acton—then Sergeant Acton, and I apoligize if I refer to him as such. But, Captain Russell wanted me to assist him in the case, and we all three, gathered in my office at Holloman. At that point in time, Sergeant Acton indicated he had no problem with my discussing the case with Captain Russell, and in giving him my understanding of the facts, but that he no longer desired to have me represent him in the matter.

An affidavit from Captain Russell was received in evidence at the *DuBay* hearing, in which Captain Russell recited the following:

> On 17 August 1991, I noted in my MFRs [Memos for the Record] that I had already asked SSgt Acton about whether Capt Bartlemay could continue to rep-

resent him as it would help me prepare, Capt Bartlemay's office was located locally, and it would not change my approach, including the raising of any issues then of concern to SSgt Acton. He asked me why I kept asking. He told me he had not done a written release because he doesn't like to put things in writing, but that he wanted Capt Bartlemay off the case, period. I told him that Capt Bartlemay's letter indicating withdrawal was insufficient to release Capt Bartlemay and he could still represent SSgt Acton, if SSgt Acton approved. Because of the nature of his complaints regarding his representation at trial, I told SSgt Acton he would have to put it in writing if he wanted Capt Bartlemay to remain on the case and that Capt Bartlemay might still have to be released if we raised significant issues of incompetency of counsel. SSgt Acton then again reiterated that he did not want Capt Bartlemay to represent him further, especially as he specifically wanted me to raise issues concerning the lack of representation by Capt Bartlemay.

* * * *

Every time the subject was raised, SSgt Acton made it clear that he had released Capt Bartlemay and did not want him involved further, with the very limited exception of briefing me one time on the court-martial. I have no doubt that SSgt Acton knowingly and properly released Capt Bartlemay from further representation, probably before, but at the latest on 17 August 1991.

Appellant testified that he had "no recollection" of the meeting among Captain Bartlemay, Captain Russell, and himself, but he conceded the possibility that it occurred and he didn't remember it.

The military judge conducting the *DuBay* hearing made findings of fact, including specific findings that ap-

pellant felt "relieved that Capt Bartlemay was withdrawing," that in August 1989 appellant "made it clear that Capt Russell could talk to Capt Bartlemay about the facts of the case, but he did not want Capt Bartlemay to represent him," and that in his clemency petition appellant "alleged that Capt Bartlemay's representation . . . had been incompetent.' " The military judge concluded by finding: "The accused made it very clear to all concerned in both actions and words that he consented to the withdrawal of Capt Bartlemay on 21 Jul 89."

Upon review of the *DuBay* hearing, the Court of Military Review held, "The record amply supports the judge's conclusion. It is clear that even if initially appellant only acquiesced in the substitution, he ultimately welcomed it." Unpub. op. at 2.

B. *Discussion*

Appellant contends that he is entitled to another sentence rehearing because his detailed defense counsel, Captain Bartlemay, improperly and unilaterally withdrew after the original trial. The Court of Military Review found that appellant consented to the withdrawal of Captain Bartlemay. Appellant contends that the Court of Military Review's decision is erroneous. We hold that Captain Bartlemay's purported unilateral withdrawal was improper but that, under the specific facts of this case, appellant was not prejudiced. Art. 59(a), UCMJ, 10 USC § 859(a).[2]

---

[2] This case involves defense counsel's improper withdrawal from an attorney-client relationship but with assurance of his client's uninterrupted representation by another lawyer and followed by the client's subsequent knowing ratification of that withdrawal. Our willingness to test for prejudice under these circumstances is distinguishable from our reluctance to test for prejudice where an estabilshed attorney-client relationship is severed by some authority outside that relationship. *See United States v. Baca*, 27 MJ 110, 119 (CMA 1988).

Except for certain situations not applicable to appellant's case, "defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." RCM 506(c), Manual, *supra*. Captain Bartlemay's purported withdrawal as counsel on July 21, 1989, was clearly in violation of RCM 506(c). Whether Captain Bartlemay's failure to comply with RCM 506(c) also constituted an ethical violation is a question we leave to the appropriate military and bar authorities.

Our conclusion that Captain Bartlemay violated RCM 506(c) does not end the inquiry. While, as the Court of Military Review found, appellant merely acquiesced in Captain Bartlemay's purported withdrawal on July 21, 1989, appellant's acquiescence ripened into a total rejection of Captain Bartlemay as his counsel in August 1989. The testimony of Captain Bartlemay and Captain Russell's affidavit, both adduced at the *DuBay* hearing, establish that in August 1989, prior to the sentence rehearing, appellant told both Captain Bartlemay and Captain Russell that he wanted Captain Bartlemay to have nothing further to do with the case. Clearly, when appellant "fired" Captain Bartlemay in August 1989, he consented to his withdrawal as of that date.

Furthermore, after appellant attacked Captain Bartlemay's performance in his August 1989 clemency petition and Captain Russell attacked Captain Bartlemay's performance in his September 1989 request for a rehearing, the lawyer-client relationship was irreparably sundered, furnishing ample good cause for excusing Captain Bartlemay. *See United States v. Kelly*, 16 MJ 244, 247 (CMA 1983) (accused's request for different lawyer satisfied good-cause requirement). The problem, of course, is that no one made appellant's consent a matter of record or

asked the military judge to excuse Captain Bartlemay. That the withdrawal was irregular is beyond cavil.

Turning to the question of prejudice, we find none. Appellant was represented by his counsel of choice at the sentence rehearing. Appellant did not want Captain Bartlemay to represent him, told him so, and attacked his competence during the post-trial review process. Appellant made it impossible for Captain Bartlemay to continue representing him; he cannot now complain about getting what he wanted: a new lawyer who would attack his old lawyer.

III. *Decision*

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX and WISS concur.

Judge CRAWFORD did not participate.

EVERETT, Senior Judge (concurring in part and dissenting in part):

In view of Acton's clearly expressed desire to replace his counsel, I agree with the majority opinion that Captain Bartlemay's withdrawal as counsel—even if not accomplished in a flawless manner—was legally effective and did not prejudice appellant's rights in any way.

I must part company from the majority, however, in its approval of the military judge's allowance of evidence about Acton's showering with his son and daughter. Of course, I accept fully the premise that it is unnecessary for evidence of other misconduct to fit into one of the categories mentioned in Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984. Those categories are simple illustrative. *United States v. Castillo,* 29 MJ 145, 150 (CMA 1989). Even so, to be admissible, the evidence must be offered for some purpose other than to show a criminal propensity on the accused's part; and also its probative value must exceed its prejudicial effect. *Cf.* Mil.R.Evid. 403.

The majority opinion makes various attempts to establish that the evidence of Acton's showering with his children and his exhibition to them of pornographic movies featuring incest had some purpose other than to demonstrate that he was "predisposed" to commit similar offenses. *United States v. Castillo, supra* at 150. The majority suggests that this evidence showed "appellant's plan or scheme to condition his daughter to accept his sexual advances as permissible and normal." — MJ at (*15*). Then they add that this evidence "was relevant to prove appellant's intent to satisfy his sexual desires, because it refuted appellant's assertion in his confession that his intent was innocent and that he had no sexual interest in his daughter." *Id.* at (*15*). The military judge had concluded that the evidence should "be admitted to

show a 'continuous course of conduct,' " as well as "to prove 'plan' and 'intent.' " — MJ at (5).

For me the stumbling block for acceptance of any such rationale results from the daughter's testimony—as a prosecution witness—that, on the evening of the alleged incident, Acton and the two children "had watched the video depicting incest" and then had taken "a shower together." Subsequently, Acton's "son asked appellant if they could sleep in appellant's bedroom where it was warmer." Subsequently all "three slept in the same bed, with appellant in the middle." *Id.* at (5-6).

This testimony—which came from the Government's own witness and was uncontradicted—is totally at odds with the theory now being advanced that Acton lured his children into bed with him. The suggestion that they all be in bed together came from the son, lacked sexual overtones, and was quite reasonable. Nothing indicates that the son made his suggestion because of showering with his father or viewing the pornographic videotape.

Thus, this testimony negates the existence of a "continuous course of conduct"—on which the military judge relied. Likewise, it undermines the theory that Acton planned to seduce his daughter by showing her a videotape which depicted incest. She got into bed with appellant for an innocent reason suggested by her brother.

With respect to admissibility predicated on intent, the majority opinion leads us astray. Intent really was not at issue in this case. If appellant performed the acts of which he was accused by his daughter, no question would exist as to his intent. Heretofore this Court has suggested that both sides present their evidence on the merits before the judge decides whether intent is at issue and whether evidence of other misconduct could be admitted to establish intent. *United States v. Franklin,* 35 MJ 311, 317 (CMA 1992). The military judge here failed to exclude

the evidence until its admissibility to prove intent was made clearer.

The majority opinion observes that within the confession, Acton "admitted showering with his children and showing them pornographic videos, but he asserted that his sole motivation was educational and he disclaimed any sexual interest in his daughter." — MJ at (*15*). Here the majority seems to be concerned with Acton's intent in showering with the children and showing them the videos—rather than his intent whe he was touching his daughter. Only the intent at the later time was material in deciding appellant's guilt or innocence; and, of course, if he did what his daughter described, there is no question as to his intent at that later time.

Perhaps my concerns would be allayed somewhat if the military judge had explicitly balanced probative value of the evidence against prejudicial effect. *See* Mil.R.Evid. 403; but, contrary to this Court's repeated recommendation, the judge failed to perform this task. Therefore, I conclude that the evidence should have been excluded and the *motion in limine* granted.

As to prejudicial effect, I must concede that, in light of Acton's confession, it is likely that he would be convicted again even without the questioned evidence. However, this outcome is not so likely that affirmance is required now. *Cf. United States v. Mann,* 25 MJ 1, 5 (CMA) (Everett, C.J., concurring in part and dissenting in part), *cert. denied,* 488 U.S. 824 (1988). Therefore, I would reverse the decision below as to the charge of sexual assault and authorize a rehearing.

APPENDIX G

UNITED STATES COURT OF MILITARY APPEALS

No. 68,114

CMR No. 29011

UNITED STATES,

Appellee

v.

RALF E. JACKSON, Senior Airman
U.S. Air Force,

Appellant

Argued June 3, 1993

Decided Sep. 28, 1993

Counsel

For Appellant: *Captain David D. Jividen* (argued); *Colonel Terry J. Woodhouse* (on brief); *Lieutenant Colonel Frank J. Spinner* and *Major Mary C. Yastishock.*

For Appellee: *Captain Jules D. Silberberg* (argued); *Colonel Richard L. Prudon, Lieutenant Colonel Jeffrey T. Infelise, Captain David C. Wesley* (on brief); *Major John H. Kongable.*

Military Judge: Kevin L. Daugherty.

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer members convicted appellant, contrary to his pleas, of wrongfully using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The approved sentence provides for a bad-conduct discharge, confinement for 30 days, and reduction to airman. The Court of Mililary Review affirmed the findings and sentence in an unpublished opinion dated April 10, 1992. This Court granted review of the following issue:

> WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY INSTRUCTING THE MEMBERS NOT TO REGARD THE ADMISSIONS MADE BY THE PROESCUTION'S EXPERT WITNESS ON CROSS-EXAMINATION FOR THE TRUTH OF THE MATTERS CONTAINED THEREIN.

The prosecution's case rested solely on the basis of a positive urinalysis (Pros. Ex. 7). The laboratory report regarding the urinalysis was identified and explained at length by a government expert, Dr. William Sweet.

The defense consisted of an attempt to discredit the laboratory report by extensive cross-examination of Dr. Sweet, evidence of appellant's good character, and the sworn testimony of appellant denying that he had used marijuana.

At issue are the instructions of the military judge concerning the proper use of matters developed during the defense cross-examination of Dr. Sweet. The defense cross-examination utilized two types of extrinsic sources: learned treatises discussing the pitfalls of urinalysis and quality-control reports from the laboratory. Appellant argues that Dr. Sweet made "admissions" which were dismissed by the military judge's incorrect instructions.

Dr. Sweet was asked by defense counsel to comment on the writings of several experts regarding the difficulties in conducting an accurate urinalysis. The following are pertinent excerpts from defense counsel's cross-examination:

> Q: Now, Dr. Dubowski has written the following, and I would like to ask whether you agree. He's written, "Unfortunately, the second major characteristic of immunochemical assays in general, in addition to their high sensitivity, is their cross-reactivity, that is their response to other sample constituents that the one antigen used to produce the antibody, ... This propensity, in effect, . . . can produce false positive results." Would you agree with that statement, Dr. Sweet?
>
> A: As a statement of a generally recognized problem, yes I would agree with that statement. Whether or not—I would have to read the rest of the written material surrounding that, to see precisely what limits he was placing on that statement.
>
> Q: But at this point, as a general statement—
>
> A: —But as a general, broad statement, yes, that's correct. That would be a statement, I think, that could be ascribed to by most anyone in the field.
>
> * * * *
>
> Q: Okay. I'm going to read you a quotation again from Dr. Dubowski, and I'm going to ask you whether you agree with it. "No one knows how many dozens, hundreds, or thousands of other chemical compounds can or will have an identical retention time, peak shape, and end detector response if present in the sample and amenable to the extraction procedure used. Phrased differently, the identification of a presumed anti-like by typical GC entities,

such as retention time or retention index, is distinctly an assumption."

A: That's just what I said, yes. With the kind of —same kind of caveats that we've discussed in the last quotation that you read from him, yes I would agree with that.

* * * *

Q: Dr. Fredericks himself has written the following: "In the selective ion monitoring mode," which is the one we're talking about.

A. Yes.

Q. "Only the ion currents of a few fragments characteristics of the anilide monitor, this mode offers greater sensitivity but at the expense of specificity, because identification is based on a less specific pattern." Would you agree with that statement?

A: As far as it goes, which isn's quite far enough, yes I would agree with it.

The cross-examination then shifted to the quality-control reports. The reports were not introduced in evidence but were used to cross-examine Dr. Sweet regarding his claim of 100% accuracy. The reports reflect that a certain number of "runs" were rejected by quality-control inspectors because of technical defects in the analyses.

Defense counsel first cross-examined Dr. Sweet about a quality control report for January 1990. Counsel noted that "out of 42 runs done in January, six were marked as unacceptable" and "four were unacceptable because of unacceptable blinds." (Blinds are known samples used to test the accuracy of the testing process.) Asked what was meant by "unacceptable blinds," Dr. Sweet responded, "It means any of several things," including the possibility "that the concentration for the blinds were not

in the expected range." Defense counsel asked if the blinds were unacceptable "because you were expecting a certain result and you didn't get them," and Dr. Sweet agreed.

Defense counsel then questioned Dr. Sweet about the report for February 1990, reciting that "this report states, Dr. Sweet, that of 44 runs, five were unacceptable and were associated with an apparent problem in the extraction procedure . . . manifested by the appearance of extraneous peaks eluting prior to the THC." Asked to comment, Dr. Sweet explained that it was a problem occurring "periodically over the last several years, in which at random intervals there are clusters of runs in which a peak appeared on the chromatogram, in addition to the THC acid peak, and eluding [sic] earlier than that THC acid peak." Dr. Sweet explained that the problem exists "in the peak recognition software" of the computer and that the computer "will then look at the retention time of that peak and see that it is not THC, not the same retention time," and erroneously conclude that "it's a different compound," because "it says that the THC is out of the allowable range, retention time, and therefore, it is not THC." Dr. Sweet testified that the problem had been investigated for several years but that its cause was unknown and "will probably come up again sometime."

Defense counsel then turned to the quality-control report for March 1990, which recited "that on 32 runs, confirmations for THC, three were unacceptable because of chromatography." He asked Dr. Sweet to define "poor chromatography." Dr. Sweet defined it as "[e]ssentially, peak shapes that are not idealized bell shape curves," due to "multiple causes that are not clearly understood." Asked of some urine samples do not test well by chromatography, Dr. Sweet replied:

> That is correct. Occasionally a urine has been declared presumptive positive by RIA, but acceptable

> chromatography could not be achieved on that urine, and it is reported out as unfit for testing.

Asked to explain why "acceptable chromatography" cannot be achieved, Dr. Sweet responded:

> It's unknown basically. There are speculations and hypotheses, but there is not an adequate level of proof to say with any degree of assurance that this is the cause or these two things are the most probable causes.

Defense counsel then turned to a memorandum for record dated April 1990 and questioned Dr. Sweet about "an RIA screen that failed because of negative QC blinds, actually produced a positive result." Asked to explain, Dr. Sweet testified:

> As we discussed yesterday, with this centrifugation technique, a glob in the bottom of the tube is centrifuged out and the overlying aqueous layer is poured off.
>
> * * * *
>
> This is a sticky substance and a large fraction of the time, well over 99 percent of the time, the entire pellet stays there. There is a possibility that the whole pellet or a fragment thereof will become detached and wash out, carrying its radioactivity with it, the count will then go down and it will be recorded as a positive. This is always a possibility in anytime that one does the immunoassay . . . . The standard procedure is blinded out for any reason, including thoroughly explainable reasons. The whole batch is reanalyzed from fresh aliquots.

Defense counsel concluded his cross-examination by focusing on Dr. Sweet's claim of 100% accuracy, questioning Dr. Sweet as follows:

> Q: Okay. Now, let's work this out. Your definition of a false positive is a report that says

positive coming from the lab, when in fact there is no drug present in the urine?

A: That is correct. No drug present above the cutoff level.

Q: Okay. No drug present above the cutoff level, present in the urine. Now, to back this up, you have stated that there are a number of internal and external controls.

A: Yes.

Q: But all we can really say, Dr. Sweet, is that those internal and external controls have all been reported correctly, isn't that right?

A: No, that's not all that one can say. One can say that with certainty. One can also say that the samples are tested three different times on three different aliquots, by two different methods, and that they are all coincident, that they all produce the same conclusion. So, one has more evidence than simply some blind quality controls from external agencies.

Immediately after the cross-examination of Dr. Sweet was completed, the military judge instructed the court members as follows:

Mr. President, members of the court, during the cross-examination, various statements were read by counsel to the witness. Those statements were admitted solely for the purpose of testing the testimony of this witness. You may not consider those statements for the truth of the matter contained in the statement. Likewise, certain exhibits were shown, but not offered nor admitted. Again, for the purpose of testing the testimony of this witness. Similarly, you may not consider those documents for the truth of the matter contained in those documents. Do you have any questions about my instruction?

A court member then inquired:

> Just to be sure that I understand. In other words, if Dr. Sweet—if the statements were read to Dr. Sweet and he said the 'A' is true, I cannot assume that 'A' is true?

The military judge responded:

> That is correct. It's offered to test or explain or expound on the testimony of this witness, but you may not consider the statements or the documents for the truth of the matter contained therein.

On redirect, Dr. Sweet testified that none of the problems mentioned in the quality-control reports were experienced in this case. Dr. Sweet concluded by explaining the significance of the quality-control reports as follows:

> Q: First, let me ask you, it is uncommon or is the fact these were reported out of standard surprise you or strike you as—does it cause concern to you?
>
> A: It does not cause a level of concern that would be about the testing process in general. If this kind of thing were to happen with high frequency, *it would be more a cause for budgetary concerns, because the batches, screen or otherwise, have to be redone every time that a quality control does not work*. It is relatively uncommon, but it certainly occurs with regularity.
>
> Q: Now, without going back through the bad chromatography or extraction or discussing anything further, let me ask you this. Would any of the matters raised in those monthly reports you talked about cause a false positive to be reported?
>
> A: No.

(Emphasis added.)

In response to a court member's question about the possibility of a laboratory technician with an "ax to grind" injecting "an illegal substance" into a urine sample, Dr. Sweet responded that it would be [h]ighly unlikely" because each sample is tested three times by three different technicians and all three sets of tests, both screening and confirmatory, must be positive for the same to be reported positive.

Appellant argues that the military judge's instruction erroneously required the court members to disregard Dr. Sweet's "admissions" regarding the opinions of other experts and the errors in the testing process. On the other hand, the Government argues that Dr. Sweet did not adopt the matters referred to in cross-examination; but that, even if he did adopt them, the same evidence was presented to the court members by other means.

A "military judge should give a limiting instruction" when hearsay evidence is used on cross-examination to test an expert's opinion. *United States v. Neeley,* 25 MJ 105, 107 (CMA 1987), *cert. denied,* 484 U.S. 1011 (1988); Mil.R.Evid. 703, Drafters' Analysis Manual for Courts-Martial, United States, 1984 at A22-46 (Change 3). The purpose of such an instruction is to prevent a party from "smuggl[ing]" inadmissible hearsay into the trial by referring to it in cross-examination. 25 MJ at 107.

In this case the military judge's instruction that the court members may not "assume" a fact to be true because the expert says it is true was technically correct. Court members must determine the facts, not assume them.

Regarding the learned treatises referred to on cross-examination, Dr. Sweet agreed with the writings of Dr. Dubowski and Dr. Fredericks regarding the pitfalls of drug testing. Those writings were not excludable as hearsay,

but were admissible as part of Dr. Sweet's expert testimony. *See* Mil.R.Evid. 803(18) (learned treatises called to attention of expert or relied upon by expert not excluded by hearsay rule).* To the extent that the military judge's instruction precluded the members from considering those writings for their truth, it was erroneous.

Regarding the quality-control reports, much of Dr. Sweet's testimony simply defined terms such as "unacceptable blinds" and "poor chromatography." He did not testify to or adopt the statistics or conclusions in the reports, and defense counsel did not offer the reports in evidence. Therefore, the statistics and conclusions recited in the reports were hearsay and properly limited by the military judge's instruction.

Dr. Sweet did testify from his own knowledge about three facts addresed in the quality-control reports: (1) the problem involving the peak-recognition software; (2) the fact that some urine samples cannot satisfactorily be tested by chromatography; and (3) the fact that an RIA screen failed in April 1990 and was reanalyzed. To the extent that the military judge's instruction precluded the court members from considering these factual statements for their truth, it was erroneous.

Where the military judge's instruction fell short was in distinguishing among the factual assertions in the quality-control reports which Dr. Sweet merely explained but did not adopt; the factual assertions in those reports about which Dr. Sweet testified from his own knowledge; and the opinions of other experts pertaining to the pitfalls of

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* Mil.R.Evid. 803(18), Manual for Courts-Martial, United States, 1984, requires, as the evidentiary foundation for learned treaties, that such writings be "established as a reliable authority by the testimony or admission of the witnesses or by other expert testimony or by judicial notice." Trial counsel waived any deficiencies in the foundation for the learned treatises by his failure to object. Mil.R.Evid. 103(a).

urinalysis, which were adopted by Dr. Sweet as his own. However, since the appellant did not object at trial to the military judge's limiting instruction, any errors in those instructions must constitute plain error to require reversal. *United States v. Hargrove*, 25 MJ 68 (CMA 1987), *cert. denied*, 488 U.S. 826 (1988); RCM 920(f), Manual, *supra*. "[T]o constitute plain error, the error must not only be both obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.'" *United States v. Fisher*, 21 MJ 327, 328 (CMA 1986); *see United States v. Olano*, 113 S.Ct. 1770 (1993). Further, the plain-error doctrine is reserved for "those circumstances in which a miscarriage of justice would otherwise result." *United States v. Fisher, supra* at 328-29.

We hold that the deficiencies in the military judge's limiting instructions do not rise to the level of plain error. With respect to the opinions of other experts, we regard appellant's characterization of Dr. Sweet's answers as "admissions" inapt. "Admissions" are "concessions" as to the existence of a fact favorable to an adversary. *See* Black's Law Dictionary 47 (6th ed. 1990) Dr. Sweet did not waver in his asertions regarding the accuracy of urinalysis in his laboratory. At most, the learned treatises expound on the difficulty of conducting an accurate urinalysis, a proposition which no one disputed.

As to the quality-control reports, Dr. Sweet did not concede most of the facts asserted, but merely explained the terms and explained how such discrepancies cou'd occur. All that Dr. Sweet admitted was that some batches had to be retested because the quality-control systems showed that those particular tests might be unreliable. In other words, the quality-control systems worked. His assertion of 100% accuracy in reporting was unshaken by the cross-examination. In the vernacular, "They never laid a glove on him."

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and WISS concur.

APPENDIX H

UNITED STATES COURT OF MILITARY APPEALS

No. 67,310

CMR No. 28545

UNITED STATES,
Appellee

v.

ROGELIO A. JOHNSON, Senior Airman
U.S. Air Force,
Appellant

Decided Sep. 28, 1993

Counsel

For Appellant: *Colonel Jeffrey R. Owens* and *Captain Ursula P. Moul* (on brief).

For Appellee: *Lieutenant Colonel Brenda J. Hollis* and *Captain James C. Sinwell* (on brief).

Military Judge: Mark De Ruyter

PER CURIAM:

Tried by a general court-martial military judge sitting alone, appellant was convicted, pursuant to his pleas, of assault; and, contrary to his pleas, of three other assaults and nine specifications alleging adultery with four different women, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 USC §§ 928 and 934, re-

spectively. The adjudged and approved sentence extends to a bad-conduct discharge, confinement and forfeiture of $250 pay per month for 12 months, and reduction to airman basic. The Court of Military Review dismissed the first specification alleging assault because of finding an improvident plea of guilty. However, that court otherwise affirmed the findings and the sentence.

Upon petition for review by this Court, we specified an issue as follows:

> WHETHER SPECIFICATIONS 1 THROUGH 5 OF CHARGE [II] (ADULTERY WITH F.W. ON DIVERS OCCASIONS) WERE MULTIPLICIOUS AND SHOULD HAVE BEEN CONSOLIDATED. *See United States v. Boyle*, Dkt. No. 67337/MC, *pet. granted*, Daily Journal, November 27, 1991.

Counsel for both sides submitted briefs concerning this issue. Defense counsel argued that "[w]hat constitutes substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person," citing *United States v. Wales*, 31 MJ 301 (CMA 1990), and *United States v. Appel*, 31 MJ 314 (CMA 1990). Final Brief at 4-5. The thrust of this argument is that an ongoing adulterous relationship is multiplicious for findings where it is alleged with the same person.

The Government responded by stating that reliance on *Wales* and *Appel* is misplaced since in both of those cases the Government had charged illegal fraternization between an officer and an enlisted person even though certain of the allegations of fraternization involved adulterous conduct.

As noted above, this case was granted to follow our opinion in *United States v. Boyle*, 36 MJ 326 (CMA 1993). That accused had been convicted of four specifications of conduct unbecoming an officer by wrongfully engaging in sexual intercourse with an enlisted woman

who was not his wife, and for making a false sworn statement. The issue granted was "[w]hether an officer accused of wrongfully having sexual relations with one enlisted woman, on four separate occasions, may be appropriately charged with, and convicted of, four separate specifications of violating Article 133." 36 MJ at 326. However, after briefing, the Government conceded that our holdings in *Appel* and *Wales* mandated that, under the circumstances of this particular case, the four specifications of conduct unbecoming an officer should be consolidated into one. 36 MJ at 327. Curiously, the accused was initially tried for four specifications alleging adultery at several places with an enlisted woman and four other specifications alleging the same occasions and locations of conduct unbecoming an officer by "wrongfully and dishonorably engag[ing] in sexual intercourse with" the same enlisted woman, among other charges. *Id.* at 326. At trial, upon motion by defense counsel, the military judge consolidated the four adultery specifications and the single fraternization specification into four specifications of conduct unbecoming an officer. He added language indicating that on each occasion the accused was a married man and the enlisted woman was not his wife. Defense counsel also moved to further consolidate these offenses into a single offense of fraternization encompassing all the times and locations involved. *Id.* at 327. This Court then consolidated specifications 1, 2, and 4 alleging conduct unbecoming an officer into specification 3, which it then redesignated as the specification, and affirmed the decision below as to such findings. *Id.* at 327-28. Consequently, the issue sought to be addressed by the specified issue here was never reached in the *Boyle* case: whether adulterous conduct charged as adultery alone with the same woman at divers locations and divers times represents a continuing offense which cannot be charged separately.

While this case has been in the appellate process we have recently decided *United States v. Teters*, Dkt. No.

67,692/AF, —— MJ —— (CMA August 12, 1993). In *Teters*, which also involved a multiple-charging situation, we held:

> In summary, we hold that appellant has failed to show that Congress expressly provided in Articles 121 and 123 or their legislative histories that multiple convictions are not authorized in this case. In addition, she has failed to show that application of the *Blockburger* [*v. United States*, 284 U.S. 299, 304 (1932)] rule to these statutes presumptively precludes separate convictions for forgery and larceny. Finally, she has failed to establish any indication of a contrary intent on Congress' part to overcome the *Blockburger* presumption that forgery and larceny are separate offenses for the purposes of findings. Accordingly, we hold that separate convictions for forgery and larceny are authorized by Congress.

—— MJ at (*19-20*).

Examination of appellant's brief has failed to show any indication that Congress intended that separate charges of adultery separated by time and place were to be considered as multiplicious or that "application of the *Blockburger* rule . . . presumptively precludes separate convictions" for these specifications. Under such circumstances we hold that this accused has failed to bear the burden to establish a congresional intent that these offenses be considered multiplicious. Therefore, we hold that adultery with the same woman at divers times and places constitutes separate offenses. *See, e.g.*, J. Miller, *Handbook of Criminal Law* § 136 at 431-32 (1934) (footnotes omitted) ("Where the offense named in the statute is adultery, without more, a single act of sexual intercourse is sufficient to constitute the crime; and each such act constitutes a separate offense."); *Wharton's Criminal Law* § 214 at 354 (C. Torcia 14th ed. 1979) (footnote

omitted) ("Adultery requires only a single act of sexual intercourse, and each adulterous act constitutes a crime.').

The decision of the United States Air Force Court of Military Review is affirmed.

COX, Judge (concurring):

See my concurring-in-the-result opinion in *United States v. Beaudin*, 35 MJ 385, 388 (CMA, 1992), and *United States v. Wilson*, 35 MJ 473, 475 n.3 (CMA 1992), regarding sentencing for multiple offenses such as the ones enumerated here.

APPENDIX I

UNITED STATES COURT OF MILITARY APPEALS

No. 68,354

CMR No. 29194

UNITED STATES,

Appellee

v.

STUART A. MAXWELL, Senior Airman
U.S. Air Force,

Appellant

Argued July 14, 1993

Decided Sep. 28, 1993

Counsel

For Appellant: *Captain Gilbert J. Andia, Jr.* (argued); *Colonel Terry J. Woodhouse* (on brief); *Lieutenant Colonel Jay L. Cohen* and *Major Mary C. Yastishock.*

For Appellee: *Captain Jules D. Silberberg* (argued); *Colonel Richard L. Purdon, Lieutenant Colonel Jeffery T. Infelise, Captain David C. Wesley* (on brief).

Military Judge: Robert M. Richards.

Opinion of the Court

COX, Judge:

On May 21, 1989, at approximately 6:00 p.m., appellant's car hit another car head-on on a 2-lane road in

Germany. The driver of the other car died. There were no passengers and no witnesses. Appellant was flown by helicopter to the Army Regional Medical Center where he was temporarily identified as "John Doe" and treated for his injuries. Appellant subsequently was convicted of involuntary manslaughter by driving while intoxicated.[1]

At trial, the military judge denied appellant's motion to suppress the results of a blood-alcohol test (BAT) administered while appellant was being treated in the emergency room. This was the only evidence of appellant's intoxication at the time of the accident. Appellant challenges admissibility of the test results on two grounds. First, he asserts the blood-alcohol test was not medically necessary, and, therefore, its results were not admissible pursuant to Mil.R.Evid. 312(f), Manual for Courts-Martial, United States, 1984. Next, he argues the Government failed to establish a sufficient chain of custody for the blood sample. We disagree.

Mil.R.Evid. 312, which provides for admissibility of evidence that would otherwise be excluded as the product of an unlawful search or seizure, states:

> (f) Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil.R.Evid. 311.

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[1] Appellant was tried by general court-martial composed of officer members and, contrary to his pleas, he was convicted of involuntary manslaughter, in violation of Article 119, Uniform Code of Military Justice, 10 USC § 919. He was sentenced to a bad-conduct discharge, confinement for 24 months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged, and the Court of Military Review affirmed with a lengthy unpublished opinion.

Appellant's blood was drawn in the emergency room for a trauma pack—series of samples, including five or six tubes of blood, taken in anticipation of tests which may be run depending on the orders of the physician. Pursuant to the doctor's orders, appellant's blood was tested for alcohol and revealed an alcohol content of 1.80 or 1.81 milligrams per milliliter. Dr. (Captain) Barnes one of the physicians present in the emergency room while appellant was being treated, testified that blood-alcohol tests are performed where a physician suspects alcohol may be involved and that alcohol is involved in about 40 percent of car accidents. He also noted that protocol suggests blood-alcohol tests be performed in trauma cases and stated the results of the blood-alcohol tests are used in diagnosis. To a doctor it is important to know whether a patient has consumed alcohol because it can cause a drop in blood pressure and can change fluid levels and mental status. Dr. (Captain) Kane, the treating physician, testified that it is standard operating procedure to perform a list of tests on trauma patients; a blood-alcohol test is on that list to help determine factors impacting the patient's condition. He additionally testified, however, that in appellant's case the results of the blood-alcohol test did not actually affect his treatment.

Appellant argues that the blood-alcohol test was thus not necessary for his treatment and should not have been admitted into evidence. The military judge made the following conclusions:

> Dr. Kane ordered blood tests in accordance with the standard operating procedures of the Trauma Protocol, since the accused was a trauma patient at the time showing signs of head trauma. Both Dr. Barnes and Dr. Kane gave examples of why a medical BAT [blood alcohol test] is sought and why it's a suggested practice to get it, and how it's used in determining diagnosis and treatments. Diagnosis and

> treatment are both valid medical purposes within [Mil.R.Evid.] 312 (f) . . . .

The military judge's conclusions are supported by the record. Although the samples did not ultimately impact appellant's treatment, they were taken for valid diagnostic and treatment purposes and are admissible pursuant to Mil.R.Evid. 312(f). *See* Drafter's Analysis of Mil.R.Evid. 312(f), Manual, *supra* at A22-17; *see also United States v. Miller,* 15 USCMA 320, 35 CMR 292 (1965) (a blood sample which was taken from an unconscious accused "for diagnostic purposes" was admissible).

Turning to appellant's second argument regarding admissibility of the blood-alcohol test, we note the Government bears the burden of establishing an adequate foundation for admission of evidence against an accused. *United States v. Gonzales,* No. 67,999, — MJ — (CMA 1993); *United States v. Courts,* 9 MJ 285, 290 (CMA 1980); *United States v. Nault,* 4 MJ 318, 319 (CMA 1978). If the items sought to be introduced are readily identifiable, a foundation may be established by an identifying witness. *United States v. Parker,* 10 MJ 415, 416 (CMA 1981) [*citing United States v. Fowler,* 9 MJ 149 (CMA 1980)]. However, for admission of fungible evidence,[2] there must be a "showing of continuous custody which preserves the evidence in an unaltered state." *United States v. Nault,* 4 MJ at 319. Likewise, the results of tests performed on a fungible substance require a "chain of custody on which to predicate admission of the laboratory analysis into evidence." *United States v. Courts,* 9 MJ at 290; *see United States v. Nault, supra*; *United States v. Bass,* 8 USCMA 299, 24 CMR 109 (1957). The Government must show that there is a rea-

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[2] Blood samples are considered fungible, thus requiring a chain of custody to be established for their admission as evidence. *See* E.Imwrinkelried, P.Gianelli, F.Gilligan, F.Lederer, *Courtroom Criminal Evidence* § 503 at 97 (1987).

sonable probability the sample which was tested was in fact from the purported sources *and* that it was not altered, but the "chain-of-custody evidence must be adequate—not infallible." *United States v. Ladd,* 885 F.2d 954, 957 (1st Cir. 1989). The Government is not required to exclude every possibility of tampering. *United States v. Courts,* 9 MJ at 291 [*citing Gass v. United States,* 416 F.2d 767, 770 (D.C. Cir. 1969)]; *United States v. Jones,* 404 F.Supp. 529, 542-43 (E.D.Pa. 1975), *aff'd,* 538 F.2d 321 (3d Cir. 1976)]. Where the chain of custody is incomplete, other evidence may be sufficient to "bridge the gap." *See United States v. Nault,* 4 MJ at 320. "[T]he fact of a 'missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be.' " *United States v. Howard-Arias,* 679 F.2d 363, 366 (4th Cir.), cert. denied, 459 U.S. 874 (1982). There may be other facts sufficient to convince the military judge that the evidence in question is in a reliable condition. *United States v. Fowler,* 9 MJ at 152.

"[T]he Court need only be satisfied that in *reasonable probability* the article had not been changed in important respects." *United States v. Courts,* 9 MJ at 291 (emphasis added) [*quoting West v. United States,* 359 F.2d 50, 55 (8th Cir.), *cert. denied,* 385 U.S. 867 (1966)]. *See also United States v. Ladd,* 885 F.2d at 956 [It must be *"reasonably probable* that the evidence is what it purports to be" (emphasis added)]; *United States v. Olson,* 846 F.2d 1103, 1116 (7th Cir. 1988) ("If the trial judge is satisfied that in *reasonable probability* the evidence has not been altered in any material respect, he may permit its introduction.' " (Emphasis added.)][3] The

[3] Prior to the adoption of the Federal Rules of Evidence, the [federal] courts described the standard of proof [for chain of custody] in various ways. The most common expression of the standard was that the offering party had to establish the identity and condition of the exhibit by a "reasonable probability." Phrases such as "reasonable certainty" and "reasonable assur-

Government may meet its burden of proof with direct or circumstantial evidence.

The forms from the emergency room indicate that appellant arrived at 8:00 p.m. on May 21, 1989, and Dr. Kane ordered appellant's blood-alcohol test. However, Dr. Kane had little recollection of the night appellant entered the emergency room and had no knowledge of who drew appellant's blood or delivered it to the laboratory; he did not remember labeling the test tubes or filling out a lab slip for the tests. He testified it is standard procedures to make test tubes "John Doe" where the patient is unidentified. Sergeant Wolf (a Licensed Practical Nurse), the nurse assisting Dr. Barnes with appellant's treatment, also stated he could not remember who drew appellant's blood or took it to the lab. The nurse explained that the test tubes are a vacuum and are filled with blood by inserting a syringe into each tube. After blood has been put in the tube, nothing can be added without blowing the top off the tube.

Specialist Ritter was the lab technician the night appellant was treated in the emergency room. He testified

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ance" seem only variants of this standard. The reasonable probability standard appears to require no more than the "preponderance of evidence" or "more probable than not" standard, and some courts have explicitly expressed the standard in those terms. . . . [T]he trial court determines whether this standard has been satisfied.

Courtroom Criminal Evidence, supra, § 506 at 103-04 (footnotes omitted).

> The [state] courts have expressed the proponent's burden in various ways. Some have said that he must prove the chain by a "clear preponderance" of the evidence. Others have said that he must establish a "reasonable certainty." Others say that he must prove the chain "unequivocally." Still others say he must create a "clear assurance." The most definite and often used expression is that the proponent must prove a "reasonable probability."

Imwinkelried, *The Identification of Original, Real Evidence,* 61 Mil.L.Rev. 145, 158 (Summer 1973) (footnotes omitted).

it is standard procedure for him to match the name on the lab slip with the name on the tube, assign the sample a number, make an entry on the log sheet, and run the ordered test. On the night appellant was tested, Specialist Ritter ran a blood-alcohol test on blood in a tube labeled "John Doe" received from the emergency room which revealed a blood alcohol level of 7.8 milligrams per milliliter; later that evening he received word from the emergency room that "John Doe" was "Stewart Maxwell." He called the emergency room to relay the test results at 8:55 p.m.

The circumstantial evidence in this case supports the conclusion that the blood sample at issue was appellant's and that its condition was not substantially changed from the time it was taken to the time is was tested. Appellant arrived in the emergency room with serious injuries from a car accident, and a blood-alcohol test is standard trauma procedure. It is also standard procedure for someone to take samples from the emergency room immediately to the laboratory. Where the identity of a patient is unknown, the samples are labeled "John Doe." *The testimony of Sergeant Wolf, albeit not conclusive, supports the proposition that there was no other "John Doe" admitted to the emergency room on the night of appellant's accident; "John Doe" had blood drawn for tests; and there was only one "John Doe" entered into the log sheet in the laboratory.* This John Doe was later identified as "Stewart Maxwell." The vacuum test tube containing the sample was labeled "John Doe." If anyone had attempted to tamper with the sample, the vacuum would have been lost and the cap would have blown off the tube. The short time span between appellant's arrival at the hospital and the reporting of the results of the blood-alcohol test (55 minutes), as well as lack of motive, support the conclusion the sample was "substantially unchanged." *United States v. Parker,* 10 MJ at 416.

In *United States v. Bass,* 8 USCMA 299, 24 CMR 109 (1957), two urine specimens were taken and put in sealed containers. One handler of the specimens failed to testify at trial; he had etched his initials on the samples and held them for less than 24 hours. The gap in the chain in custody resulting from the lack of testimony did not prevent the evidence from being properly admitted. There was no evidence of tampering, and the successor handler testified that when he received the samples, the seals were in tact. Th Government successfully bridged the gap in the chain. *See also United States v. Burton,* 866 F.2d 1057, 1059 (8th Cir.) (chain of custody adequate for purposes of admissibility where urine samples retained proper labels but were left unattended "in an unlocked box" for a day), *cert. denied,* 490 U.S. 1110 (1989); *United States v. Picard,* 464 F.2d 215, 216 n,1 (1st Cir. 1972) (no error in admitting heroin where there was no testimony from a chemist who had handled it; but the heroin was in a sealed, locked envelope and the seal had not been broken); *West v. United States,* 359 F.2d at 55 (sealed packets and presumption of regularity of handling of evidence by public officials support finding that in reasonable probability evidence had not been tampered with).

"[G]aps in the chain of custody" do not necessarily prevent admission of evidence. *United States v. Olson,* 846 F.2d at 1117; *see United States v. Lott,* 854 F.2d 244, 250 (7th Cir. 1988); *see also United States v. Strozier,* 31 MJ 283, 287 (CMA 1990); *United States v. Pollard,* 27 MJ 376 (CMA 1989); *United States v. Howard-Arias,* 679 F.2d at 366. Any deficiencies in that chain "go to the weight of the evidence rather than its admissibility." *United States v. Olson,* 846 F.2d at 117; *see United States v. Lott,* 854 F.2d at 250; *see also United States v. Ladd,* 885 F.2d at 956; *United States v. Lampson,* 627 F.2d 62, 65 (7th Cir. 1980). We emphasize that here we are only talking about the question of admissibility of evidence. A judge's decision to admit

a piece of evidence does not carry with it any judicial imprimatur as to its weight. Our system of justice contemplates that the factfinder—here the court-martial panel —will decide questions of fact. If evidence meets the admissibility threshold and is not barred by other legal rules, the evidence goes to the factfinder. There, all the frailities and doubts surrounding the piece of evidence are to be developed and argued by the party opposing admissibility. The factfinder then determines afresh whether the evidence is probative. In a case such as this, the panel decided for itself whether the blood sample came from appellant and whether it was unaltered at the tiem of its analysis. For us to decide for ourselves the ultimate degree of probativeness of the sample would be to usurp the "jury" function.

Considering all the evidence in this case, including the lack of motivation to alter the blood sample and lack of any physical evidence of tampering, we believe it is sufficient for purposes of admissibility to link the results of the blood sample to appellant. *See United States v. Courts,* 9 MJ at 292. The trial bench is entitled to "due deference," *United States v. Strozier,* 31 MJ at 288, and we hold the military judge did not abuse his discretion in allowing the results of the blood-alcohol tests to be admitted into evidence. *See United States v. Ladd,* 885 F.2d at 956; *United States v. Olson,* 846 F.2d at 1116, 1117; *United States v. Lott,* 854 F.2d at 250-51; *United States v. Gay,* 774 F.2d 368, 374-75 (10th Cir. 1985); *United States v. Howard-Arias,* 679 F.2d at 366; *United States v. West,* 359 F.2d at 55; *United States v. Carrott,* 25 MJ 823, 824 (AFCMR 1988); *United States v. Hudson,* 20 MJ 607, 608 (AFCMR), *pet. denied,* 21 MJ 32 (CMA 1985).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

APPENDIX J

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0534

CMR No. 29123

UNITED STATES,

Appellee

v.

KEVIN A. FRENCH, Airman First Class (E-3)
U.S. Air Force,

Appellant

Argued July 14, 1993

Decided September 30, 1993

Counsel

For Appellant: *Lieutenant Colonel Frank J. Spinner* (argued); *Lieutenant Colonel Terry J. Woodhouse* (on brief).

For Appellee: *Major John H. Kongable* (argued); *Colonel Richard L. Purdon, Lieutenant Colonel Jeffrey T. Infelise* (on brief).

Military Judges. Michael B. McShane

Opinion of the Court

CRAWFORD, Judge:

After a denial of defense motions to suppress his confession and the evidence derived from his house, appellant

entered a conditional plea of guilty to possessing lysergic acid diethylamide (LSD), possessing marijuana, and using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Contrary to his pleas, he was found guilty of using methamphetamine in violation of Article 112a. The convening authority approved the sentence of a bad-conduct discharge, 8 months' confinement, partial forfeitures, and reduction to the lowest enlisted grade. The Court of Military Review affirmed the findings and sentence. 36 MJ 589 (1992). We granted review on the following issues:

I

WHETHER THE INVOLVEMENT OF AIR FORCE PERSONNEL IN AN INTERVIEW CONDUCTED BY BRITISH AUTHORITIES UNDER THE FACTS OF THIS CASE CONSTITUTED "PARTICIPATION" UNDER MIL.R.EVID. 305 (h)(2), TRIGGERING THE REQUIREMENT TO GIVE ARTICLE 31, UCMJ, and *MIRANDA* RIGHTS' ADVICE.

II

WHETHER THE INVOLVEMENT OF AIR FORCE PERSONNEL IN AN INTERVIEW CONDUCTED BY BRITISH AUTHORITIES UNDER THE FACTS OF THIS CASE CONSTITUTED "PARTICIPATION" UNDER MIL.R.EVID. 311 (c)(1), TRIGGERING THE REQUIREMENT TO COMPLY WITH THE FOURTH AMENDMENT.

We hold that involvement of Air Force personnel did not trigger the requirement to give rights warnings or to comply with the Fourth Amendment.

FACTS

An undercover informant who was working with the Air Force Office of Special Investigations (OSI) began working with British law enforcement officials when the sources of information led to British nationals. This investigation by the British police resulted in the arrest of Travis Pelc, a British national, and the dependent spouse of an active duty military member, for the possession, use, and supply of controlled drugs. At the time of his arrest Mr. Pelc indicated he sold LSD and marijuana to appellant and his wife. Based upon this information, British law enforcement officers, Detective Sergeant John Paul Scotney and Detective Constable Newton, accompanied by OSI Special Agent Sterne, briefed appellant's commander and his first sergeant about this information. Accompanied by the first sergeant, they went to appellant's duty station where appellant was arrested by the British law enforcement officers.

Appellant testified that after the initial introduction at his workplace he sat back down in his chair, looked at his first sergeant and asked for help. His first sergeant indicated that "this was under British law," and the first sergeant "had nothing to do with it."

Before interrogating appellant, the British police had already taken appellant's wife into custody and knew that a search was being conducted of their house for drugs. Appellant was warned by the British interrogators that he had a right to remain silent and that anything he said could be used in evidence against him. Appellant initially denied any knowledge of a drug sale to Pelc, drug use, or drugs in his house. Several minutes after the denial, Agent Sterne made a comment to the accused to the effect that "it was better to remain quiet than to continue lying." Appellant's first sergeant testified, "Then at one point, I think it was after Mick [McCready] said something to the effect that it'd be easier on him. He looked at me

and I kind of nodded that it would be." During his testimony appellant admitted that Agent Sterne told him, "It is better for you to tell the truth than to lie" and that he was never questioned by Agent Sterne or the first sergeant. Appellant does not remember the "easier" language, but he remembers the OSI agent saying "it's better for you to tell the truth than to lie, Kevin." Appellant also remembers looking at his first sergeant who nodded his head. After a short delay, appellant proceeded to give an incriminating statement.

After being interrogated at the British Police Station appellant was released later that evening. Upon his release his first sergeant picked him up and drove him to his house. Appellant asked the first sergeant to come in and talk to him and his wife. When the first sergeant went into the house he read appellant his Article 31(b) rights which appellant waived.

At trial, Detective SGT Scotney testified that the investigation was neither Air Force initiated nor a joint operation with the U.S. Air Force. He also testified that Agent Sterne and appellant's first sergeant: were there to "assist" as "[this] was a British investigation"; they made no other remarks or comments during the interrogation; and they were merely "observer[s] helping us." In fact, Detective Scotney testified this was "not a joint operation" and that assistance by the AFOSI was needed to give the British police points of contact and escorts at the base and to tell them where people lived.

Upon questioning by the judge, Agent Sterne testified as follows:

> You indicated that the British policemen needed to be escorted into Airman French's duty area?
>
> A: Yes Sir.
>
> Q: Did you also need an escort?
>
> A: Yes, Sir.

Q: And that was Sergeant Keister?

A: Yes, Sir.

Q: You could not just go in there on your own either?

A: I didn't have a restricted area badge for that area. Sir, No, Sir.

Q: What was your understanding of your reason for being along that day?

A: My understanding was to escort the British policemen, to observe what was going on, and to gather the information that being gathered out of it, if they found drugs, and so forth, because there was a direct Air Force concern, obviously, that he was an Air Force maintenance individual.

The military judge made the following findings of fact:

One, the Cambridgeshire drug squad was the lead law enforcement agency involved in investigating drug offenses in which the accused became a suspect.

Two, Air Force Office of Special Investigations personnel, Detachment 6204, RAF Alconbury, meet frequently with members of the Cambridgeshire drug squad to share information and coordinate activities. This investigation originated with British nationals and involved more British persons than person in or related to the military. There was a lower level of involvement by military members and those related to military members.

Three, the actual arrest of Travis Pelc on 25 July 1990 and the arrests of the accused and his wife later on 25 July 1990 were made by British police authorities. United States military authorities were present at those arrests primarily as observers of British police authorities and to assist the British

police authorities in locating individuals on military installations.

Four, the arrest of Travis Pelc, his being in possession of drugs, and his statement that he had provided LSD and hashish to the accused on 24 July 1990, coupled with previous information about the accused being involved with drugs, provided British police authorities with reasonable suspicion that the accused and his wife would be in possession of drugs on 25 July 1990.

Five, British police authorities, acting on their reasonable suspicion, went with AFOSI personnel to arrest the accused and his wife. Woman Detective Constable Carole McCready, accompanied by Special Agent Brian Lemelin, arrested Mrs. French at the Shoppette on RAF Upwood. Detective Sergeant John Paul Scotney and Detective Constable Newton, accompanied by Special Agent Sterne, briefed the accused's commander and first sergeant, then went with Special Agent Sterne and the first sergeant to the accused's duty station.

Six, after the first sergeant explained who everyone was, Detective Sergeant Scotney showed his identification and cautioned the accused to the effect that he did not have to say anything unless he wanted to, but that if it did say anything, it could be used as evidence. Detective Sergeant Scotney and Detective Constable Newton then asked questions of the accused concerning the location of druge at his residence. Special Agent Sterne witnessed the above events and corroborates that the accused was cautioned.

Seven, the accused answered questions put to him by the British police, initially denying knowledge of drugs. After several minutes of denials by the ac-

cused, Special Agent Sterne made a comment to the accused to the effect that "It was better to remain quiet than to continue lying." This comment was meant by Special Agent Sterne to warn the accused that the should remain silent, rather than make things worse by lying to the police. The comment was not designed to elicit a response from the accused.

Eight, a comment by the British police, Detective Constable Newton, that "It would be easier," when taken in context and immediately following Special Agent Stern's comment, does not amount to an unlawful inducement to get the accused to make admissions. I interpret that comment as an agreement by Detective Constable Newton with Special Agent Sterne's comment essentially meaning the accused should not compound his problems by lying. I do not interpret the comment as unlawfully encouraging an admission.

Nine, the accused at that point reflected upon his situation and, I conclude, decided on his own that the British police knew everything already and that discovery of the drugs was inevitable.

Ten, the accused then voluntarily disclosed the location of the LSD and indicated there was hashish in the house also.

Eleven, Woman Detective Constable McCready had by this time taken Mrs. French to the quarters on RAF Upwood. The search warrant issued earlier by a magistrate had an incorrect address on it, so she relied on Section 18 of the Police and Criminal Evidence Act of 1984 as the basis for the search of the residence before Mrs. French was transported to the Huntingdon police station. Mrs. French cooperated and showed WDC McCready where the hashish was. Through an oversight, no inspector has performed the acts specified in subsection (7) of Section 18 of the Police and Criminal Evidence Act of 1984.

Twelve, after the accused disclosed the location of the LSD, Special Agent Sterne radioed the information to his office. The information reached Special Agent Lemelin at the accused's residence; he told WDC McCready. Mrs. French assisted in actually locating the LSD. After the LSD and hashish had been found, an Air Force drug dog and handler walked through the accused's residence at the request of the British police, but nothing was found as a result of that walk-through.

Thirteen, the accused, his office, locker, and car were then searched. Nothing was found. The accused was handcuffed, using Special Agent Sterne's cuffs, for some time, but the cuffs were removed before he was transported to the Huntingdon police station.

Fourteen, at the Huntingdon police station, a custody officer authorized the accused's continuing detention and advised him on procedures, on his right to make a phone call, and on his right to consult with a solicitor. The accused did not make a phone call or ask to consult with a solicitor.

Fifteen, the accused was placed in a cell for about an hour, then brought out and reinterviewed by Detective Sergeant Scotney and WDC McCready. He was cautioned again and answered questions again. The interview was tape recorded and Appellate Exhibit V is a full transcription of the interview.

Sixteen, throughout the arrest and interrogations of the accused and his wife, the British police authorities were in charge of the case and they intended to take jurisdiction of the case.

As the Court of Military Review found:

In this drug probe initiated, controlled, and concluded by British authorities, appellant was just one

> of several suspects, and the only U.S. military member mentioned. Nothing in the OSI's earlier awareness of this case, the appearance of Air Force personnel at appellant's first interview, the single comment made by the OSI agent during that interview, or the brief use of the OSI's handcuffs in appellant's arrest, reached the level of "participation" necessary to turn the British interrogation of the appellant into a United States interrogation.

36 MJ 589, 592 (AFCMR 1992).

A. Treaty Agreements

Under the United States treaty agreement with host countries in the North Atlantic Treaty Organization (NATO)[1], the Americans retain no jurisdiction over foreign nationals or dependents accompanying the Armed Forces. Under Article VII.2.(b), exclusive jurisdiction over dependents rests with the United Kingdom:

> The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.[2]

Moreover, both the United States and the United Kingdom must "assist each other in the arrest of members of a force or civilian component or their dependents in the

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[1] North Atlantic Treaty, June 19, 1951, T.I.A.S. No. 2846, at 1792, 1798, 4 U.S. Treaties and Other International Agreements, Pt. 2 (1953).

[2] Judicial notice may be taken at any stage of the proceeding. *United States v. Bliss*, 642 F.2d 390 (10 Cir. 1982); *United States v. Jones*, 580 F.2d 219 (6 Cir. 1978). The military courts have taken judicial notice of treaties. *See, e.g., United States v. Stokes*, 12 MJ 229 (CMA 1982). *See also United States v. Brown*, 18 MJ 360 (CMA 1984).

territory of the receiving state and in handing them over to the authority which is to exercise jurisdiction . . . ." Article VII. 5(a).

Here, the investigation was unquestionably a British investigation and not a joint operation. Detective Scotney testified that the Air Force was there to "assist" and that this was not their investigation, but was a "British investigation." The arrest of appellant was not the result of a "joint operation." In fact, the investigation had centered on foreign nationals and dependents over whom the Americans had no jurisdiction whatsoever.

B. Standard of Review

Based on the deference for factual findings made by the trial judge and the appellate court below we have applied a clearly erroneous test to these findings. This Court previously indicated in *United States v. Penn,* 18 USCMA 194, 199, 39 CMR 194, 199 (1969):

> Where the evidence presents a question of fact as to the continued independence of the civilian and military investigations that question is determinable by the court members, under appropriate instructions as to the effect of the failure to comply with Article 31.

This standard was enunciated prior to Manual for Courts-Martial, United States, 1969 (Revised edition), when issues on admissibility of confessions were presented to the court members and there was no option for trial before a military judge alone.

At least one court has defined the clearly erroneous standard by stating it "must be more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old dead, unrefrigerated dead fish." *Parts and Elec. Motors Inc. v. Sterling Elec. Inc.,* 866 F.2d 228, 233 (7th Cir. 1988). *See also United States v. Rice,* 995 F.2d 719, 722 (7th Cir. 1993). While

there are numerous definitions for clearly erroneous, Professors Childress and Davis indicate, "Appellate courts must think long and hard before reversing a district court . . . ." S. Childress & M. Davis, *Federal Standards of Review* § 2.04 at 2-32-33 (2d ed. 1992). Under the facts presented in this case the findings by the judge and Court of Military Review are not clearly erroneous.

C. Presence at and or Participation in a Foreign Police Investigations and Interrogations

The question of whether presence at and participation in foreign police investigations and interrogations of military personnel requires satisfaction of Article 31(b) or the Fourth Amendment has had a checkered history before this Court. In *United States v. DeLeo,* 5 USCMA 148, 156, 17 CMR 148, 156 (1954), this Court indicated that the "mere presence of a military investigator during a search by foreign police [does not] necessarily render the proceeding an activity of the United States." This Court in *United States v. Penn,* 18 USCMA at 199, 39 CMR at 199, stated:

> Article 31 extends to the civilian investigator. . . . (1) When the scope and character of the cooperative efforts demonstrate "that the two investigations merged into an indivisible entity" . . . and (2) when the civilian investigator acts "in furtherance of any military investigation, or in any sense as an instrument of the military,"

In *United States v. Jordan,* 1 MJ 334, 337-38 (CMA 1976), this Court indicated that the "*DeLeo* standard [is] no longer satisfactory to safeguard the Constitutional rights of servicemen stationed in a foreign country." Thus it held:

> for trials by court-martial commencing after the date of this opinion, whenever American officials are present at the scene of a foreign search or, even though

> not present, provide any information or assistance, directed or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before fruits of the search may be admitted into evidence in a trial by court-martial.

Id. at 338.

In *United States v. Jones*, 6 MJ 226, 230 (CMA 1979), the Court tempered the dictum in *Jordan* by indicating that "*Jordan* refers to an American 'assistance,' the operative language is 'sets in motion, aids, or otherwise furthers the objectives of a foreign search.' " It went on to indicate the key is "an element of causation between the American activity and the production of the incriminating evidence." *Id.* It concluded the real question was not the presence of American authorities but whether the American authorities had used the foreign police as an instrumentality of the American authorities in an effort to avoid the requirements of Article 31(b).

In 1980 the President adopted Mil.R.Evid. 305(h)(2), 1969 Manual, *supra,* which provides:

> An interrogation is not "participated in" by military personnel or their agents or by the officials or agents [of a foreign government] merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government.

The analysis to this rule citing *Penn* provides: "The Rule makes it clear that United States personnel do not participate in an interrogation merely by being present at the scene." Drafter's Analysis, Mil.R.Evid. 305(h), Manual for Courts-Martial, United States, 1984, at A22-15. It referenecs the analysis to Mil.R.Evid. 311(c) which deals with foreign searches and whether they should be considered to be American searches and arrests. *Id.*

In *United States v. Morrison,* 12 MJ 272, 279 (CMA 1982), the Court asserted that the rule in *Jordan* should no longer be applied.

> Accordingly, in conformity with Rule 311(c)(3) we shall no longer hold that in itself presence at a foreign search constitutes participation therein. Instead, in each case the presence of American officials must be examined to determine whether it had the benign purposes hypothesized by [*United States v. DeLeo,* 5 USCMA 148, 17 CMR 148 (1954)] or instead was part of a scheme to evade the fourth amendment, as feared by the majority in Jordan.

More recently the Court has solidified *Penn* and its progeny in *United States v. Moreno,* 36 MJ 107, 113 (CMA 1992); *United States v. Lonetree,* 35 MJ 396, 403 (CMA 1992).

The analysis under *Penn* begins from the time of the investigation through interrogation rather than examining the case from where it was eventually tried. The fact that the individual is eventually tried by the military does not indicate that the foreign officials are an agent of the military or the investigations are so intertwined that rights warnings would be required. As amplified by Mil.R.Evid. 305(b)(1), civilian investigators are required to give warnings when the two investigations are merged into one or the civilian becomes an agent or instrument of the military. Drafter's Analysis, Mil.R.Evid. 305(b)(1). Otherwise, Article 31 warnings are not required by FBI agents, CIA agents, superior NCO's, or state law enforcement officials.

Based upon our case law, treaty obligations, and the factual findings of the judge and court below, we conclude that the minimal involvement of Air Force personnel in the British investigative effort did not trigger a rights warning requirement under Article 31(b) or the application of the Fourth Amendment. Here, the British had sole

jurisdiction over British nationals and American dependents who were the principal targets of the drug investigation. American personnel were required under treaty obligations to assist the British in arresting appellant. Additionally, British nationals were not permitted access to the classified area where appellant worked without being escorted by someone from appellant's unit. Finally, there is no evidence of a subterfuge by Air Force personnel to evade the requirements of Article 31(b). *Cf. United States v. Moreno,* 36 MJ at 114 (mental health worker's inquiry was not so "merged" with a military law enforcement or unit investigation to require Article 31(b) warnings).

Having concluded that this was a British investigation, we must now examine the interrogation in light of *Penn, Jones,* and Mil.R.Evid. 305(h)(2). While the mere presence alone of the American officials does not require rights warnings, the question is whether there was participation in the interrogation by the first sergeant and the OSI agent.

There are two inquiries that must be made. First, was the first sergeant acting as an agent of the police because of his superior rank and official position? *See United States v. Pittman,* 36 MJ 404, 407 (CMA 1993). If so, did the Americans interrogate appellant? *See Rhode Island v. Innis,* 446 U.S. 291, 301 n.7 (1980). As appellant himself testified, the first sergeant was acting as a support person, a trusted individual whose presence he valued as security, not someone because of his official position. Hence, the first sergeant was not acting as an agent of the police.

Additionally, the first sergeant did not "interrogate" appellant by nodding his head. An interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301. The single statement by the OSI agent to tell the truth or be silent did not constitute an interrogation. The statement was not followed by a statement that this would be brought to the attention of the appropriate officials for prosecution or leniency. *Cf. United States v. Dell'Aria,* 811 F. Supp. 837, 844-45 (E.D.N.Y. 1993), and cases cited therein. The British police already had arrested appellant's supplier and were searching appellant's home. Appellant's assertion that he did not know what they were talking about was obviously a lie. At this point the British police knew of appellant's involvement and a search of his quarters was initiated. Thus a *comment,* not a question, to tell the truth or be quiet under the known facts at this time was good advice.

The actions by the American representatives who were present at the interrogation were not attempts to persuade appellant to waiver his rights or incriminate himself. Appellant had already waived his rights and was talking freely, albeit untruthfully. The OSI agent merely exhorted appellant to speak truthfully, *if* he chose to speak at all. *Cf. United States v. Oakley,* 33 MJ 27, 32 (CMA 1991). The agent's comment was not intended to elicit a response, nor was it interpreted by appellant as such.

D. Conclusion

It is important that American representatives be present to protect the rights of servicemembers being investigated by foreign officials. In *DeLeo* the Court asserted:

> the serviceman, who is under investigation by the police of a foreign nation, is present in that country by reason of military orders. Having sent him there, the United States labors under a duty to protect him —so far as properly can be—with respect to the criminal procedures of that foreign government. As

> a part of such protection, it has been thought desirable to arrange for the presence of an American representative at the foreign trial of any military person. . . . Since pretrial investigation may be as important as that of the trial in the fixing of guilt or innocence, it is also desirable that American agents be present during an investigation by the police of another nation into an offense of which a member of an American military service is suspected.

5 USCMA at 155, 17 CMR at 155.

Although we do not find here the presence and cooperation of American military officials a subterfuge to avoid Article 31(b) or fourth amendment requirements, we caution all American military personnel involved in foreign investigations to be mindful of Article 31(b) and the fourth amendment. *See United States v. Moreno*, 36 MJ at 114.

The decision of the United States Air Force Court of Military Review is affirmed.

Judges COX and GIERKE concur.

WISS, Judge (concurring in part and in the result):

I agree with most of the majority opinion. The single point on which I disagree, however, does not cause me to reach a different result; that point has to do with appellant's first sergeant and the role he played during the British interrogation.

Under treaty obligations, and consistent with Article 31, Uniform Code of Military Justice, 10 USC § 831, U.S. military officials may "assist" foreign officials in the latter's arrest of an American servicemember pursuant to the foreign nation's exercise of jurisdiction—an action designed to meet such practical problems as those encountered by the British agents here, like appellant being on an American base, his working in a secured area, etc. Further, again consistent with Article 31, U.S. military officials may be "present during" investigations, interrogations, and trials of American servicemembers by host, foreign countries. *See United States v. Morrison*, 12 MJ 272 (CMA 1982); *United States v. Jones*, 6 MJ 226 (CMA 1979); *United States v. Penn*, 18 USCMA 194, 39 CMR 194 (1969); *United States v. DeLeo*, 5 USCMA 148, 17 CMR 148 (1954). These functions even-handedly facilitate the practical pursuit of legitimate foreign law enforcement efforts and, at the same time, monitor those efforts to assure fair treatment of American servicemembers.

The majority opinion seeks to isolate any action by the first sergeant during the interrogation from the circumstances to be considered in whether U.S. officials went further and, instead, participated in the foreign interrogation so as to trigger Article 31. It certainly is true, as the majority points out, that the first sergeant was "a trusted individual whose present [appellant] valued as security, not someone because of his official position." —— MJ at (*17-18*). Appellant's blind trust that his first sergeant truly would respond in his best interest,

however, does not negate the fact that the first sergeant was there *as* an official of the United States—else he would not have been permitted in the interrogation at all.

In short, notwithstanding that appellant trusted his first sergeant, the first sergeant was appellant's immediate reporting superior and was there only because he was an official of the United States. Thus, he cannot be discounted from the equation. *Cf. United States v. Kimble,* 33 MJ 284, 291 (CMA 1991).

Nonetheless, I do not believe that the first sergeant's action amounted to "participation" in the sense that requires reversal of this conviction. As this Court indicated in *United States v. Jones, supra* at 230, the key as to whether American officials' actions will trigger Article 31 is "an element of causation between the American activity and the production of the incriminating evidence." Under the specific circumstances of this case, I conclude that appellant's decision to cooperate was based on the total picture facing him at that moment. As the military judge phrased a similar conclusion, appellant "decided on his own that the British police knew everything already and that discovery of the drugs was inevitable." Finding of Fact Nine.

SULLIVAN, Chief Judge (dissenting):

I respectfully dissent from the majority opinion. It implies that AFOSI Special Agent Sterne and appellant's first sergeant were present at his interrogation to protect appellant's rights. It also suggests that "their presence and cooperation" at this interrogation was at best insensitive to Article 31, UCMJ, 10 USC § 831, and the Constitution. Such a benign view of these military authorities' participation in appellant's interrogation and resulting confession strikes me not only as unjustified but also as incredulous. *See United States v. Raymond*, No. 68,320, —— MJ —— CMA (1993).

I am also troubled by the majority opinion's conclusion that the original investigation which led to appellant's interrogation was British and not a joint operation with American military authorities. The initial question under Mil.R.Evid. 304(h)(2), Manual for Courts-Martial, United States, 1984, is whether American military authorities "instigated" appellant's interrogation by the British. I do not believe that conclusory testimony by British and American military police that this was a British investigation controlled by British police is a sufficient basis to decide this question. Moreover, I also do not consider dispositive the exclusive jurisdiction of the British over British nationals and American dependents under treaty agreements. Finally, evidence of record showing the American military police's role in causing the British to *initiate* this criminal investigation cannot be simply ignored.

I would hold clearly erroneous the findings that American military authorities did not "instigate" or "participate" in appellant's interrogation by British Police as delineated in Mil.R.Evid. 305(h)(2). *See United States v. Jones*, 6 MJ 226, 229-30 (CMA 1979); *United States v. Grisham*, 4 USCMA 694, 696, 16 CMR 268, 270 (1954); *cf. United States v. Oakley*, 33 MJ 27 (CMA

1991). *See generally United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992).

I

Facts

The evidence of record indicates that in April, 1990, Special Agent (SA) Lemelin of the Air Force Office of Special Investigations (OSI) obtained information from a confidential source that appellant and serveral of his friends, both military and civilian personnel, may have been involved in illegal drug activity at RAF Alconbury. The source provided several statements which incriminated appellant. Prior to that point, SA Lemelin had been providing the British police with daily information reports regarding the investigation of appellant, to include information gained by AFOSI-conducted surveillance of appellant's off-base residence. The confidential source provided the British police with the information used in their investigation.

On July 24, 1990, the British police arrested a dependent spouse of an active duty military member, based on information provided by the confidential source. The dependent spouse, who was appellant's neighbor, was found in possession of cannabis resin (hashish) and lysergic acid diethylamide (LSD). During questioning by British police, the dependent spouse admitted providing appellant and appellant's wife with drugs on various occasions. The British police decided to arrest both appellant and his wife. The British police coordinated with the AFOSI regarding the apprehensions. Detective Scotney and Detective Newton, of the Cambridgeshire police, met with SA Sterne of OSI and proceeded to appellant's duty station. The group met Master Sergeant (MSgt) Keister, appellant's first sergeant, at appellant's duty station. SA Sterne had requested MSgt Keister's presence during the arrest.

Detective Scotney testified that after he and Detective Newton identified themselves as British police, he advised appellant that he was "not obligated to say anything and if [he chose to] do so, what [he said] may be given in evidence." Appellant looked at the British officers' identifications and then asked his first sergeant if the British officers had authority to arrest him at his duty station. MSgt Keister replied that they did.

Appellant initially denied involvement in any illegal drug activity. He testified that after denying involvement, SA Sterne interjected that "[i]t's better for you to tell the truth than to lie." SA Sterne testified that "I told him it would be better if he remained quiet than to continue lying." MSgt Keister testified that he heard SA Sterne say something to the effect that "it's better if you don't talk at all if you're going to lie." After SA Stern's statement, one of the Cambridgeshire police officers said that it would be easier on appellant if he helped the police. MSgt Keister further testified that appellant looked at him and that he, the first sergeant, nodded to appellant conveying agreement with the officer that it would be easier on appellant if he cooperated. After about one minute, appellant confessed that there were drugs in his residence.

SA Sterne reported the presence of drugs in appellant's residence to AFOSI headquarters via radio transmissions. SA Sterne asked the British police if they had brought their handcuffs, and after they stated that they had not, he put his handcuffs on appellant's wrists and directed him out of the duty section. Appellant was taken to the Cambridgeshire police station where he was questioned.

Simultaneously with appellant's arrest, SA Lemelin, and Detective Constable McCready of the Cambridgeshire police, went together to arrest appellant's wife at the RAF Upwood base shoppette where she was working. They transported appellant's wife to her and appellant's residence. A warrant to search the residence had been ob-

tained, but was not executed because it did not correctly identify appellant's residence as the place to be searched. The British police, with SA Lemelin in attendance, conducted a search pursuant to British law—Section 18 of the Police and Criminal Evidence Act of 1984. Section 18 authorizes a search of an individual's residence when the person has been arrested and reasonable suspicion exists to believe that evidence of the crime for which he or she has been arrested may be found at the residence.

During the search of appellant's residence, appellant's wife told the police where the hashish could be found. SA Lemelin received information from SA Sterne's radio transmissions and, following the instructions appellant provided SA Sterne, directed the British police to where they could find LSD in a box in the corner of a cupboard in the residence.

At trial, defense counsel made a written motion to suppress appellant's admissions, and any derivative evidence thereof, that were made to the British police in the presence of SA Sterne and MSgt Keister.[1] Defense counsel argued that the actions of SA Sterne and MSgt Keister went beyond mere presence or making appellant available for interrogation by foreign officials and amounted to participation in the interrogation. The defense conceded that the interrogation was initiated by Detectives Scotney and Newton. Defense counsel further argued that appellant's confession was a "reasonable consequence" of SA Sterne's verbal statement and MSgt Keister's nonverbal gesture. Government counsel retorted by arguing that the British police were "not acting as an instrumentality of the AFOSI or the Air Force." Furthermore, trial counsel argued that "[SA Sterne's and MSgt Keister's] presence and minimal involvement never transferred the control of the investigation or interrogation to military authority."

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[1] Appellant entered conditional pleas of guilty in this case. *See* RCM 910(a), Manual for Courts-Martial, United States, 1984.

The military judge made extensive findings of fact and conclusions of law about the investigation and subsequent arrest and questioning of appellant and his wife. Essentially, the military judge found that the investigation was a British operation and that, while AFOSI and British police shared information, it was not a joint investigation. The military judge also concluded that the presence of SA Sterne and MSgt Keister during appellant's arrest and questioning, and the presence of SA Lemelin at appellant's residence during the search by Detective McCready, did not transform the interrogation or search "into one conducted, instigated, or participated in by [U.S.] military personnel." The military judge ruled that the statement by appellant during the questioning on July 25, 1990, and the evidence seized during the search of appellant's residence were admissible under Mil.R.Evid. 305 (h)(2) and 311(c), respectively. Since the statement and seized items were admissible, the military judge found no taint attached to any later statement made by appellant.

On appeal to the Court of Military Review, appellant "maintain[ed] the trial judge erred in admitting the statements he . . . made to British investigators and the evidence seized as a result of those statements." 36 MJ 589, 592 (1992). Relying on *United States v. Jones*, 6 MJ 226 (CMA 1979), the court below held "that any Air Force involvement in appellant's initial interrogation never exceeded a "mere presence.'" The Court of Military Review stated that the actions of Air Force personnel prior to and during the interview did not "reach[] the level of 'participation' necessary to turn the British interrogation of the appellant into a United States interrogation. Therefore, no Article 31 or *Miranda* requirements were invoked when British officials interviewed the appellant." 36 MJ at 592 (citing Mil.R.Evid. 305(h)(2)) (citations omitted).

II

Adequacy of Warnings

The first granted issue concerns the admissibility of appellant's initial confession to British Police on July 24, 1990. Appellant expressly sought suppression of this evidence under Mil.R.Evid. 305(h)(2). *See generally* Mil.R.Evid. 304(a) and 305(a). *See also* Art. 31(d) and *Miranda v. Arizona*, 384 U.S. 436 (1966). He contended that military personnel participated in his interrogation by foreign police. Thus, he asserted that the prosecution was required to show that he was provided certain rights advisement before any statements made during this interrogation could be admitted against him at his court-martial. *See* Mil.R.Evid. 305(h). *See also United States v. Grisham, supra* at 697; *United States v. Covington*, 783 F.2d 1052, 1056 (9th Cir. 1985).[2] On appeal he implies that "sufficient participation" existed in his case as a matter of law.

A preliminary question in this case is the legal sufficiency of the warnings given by the British Police prior to questioning appellant. I note that the Court of Military Review found that they only "cautioned the appellant that he did not have to say anything unless he wanted to but that if he did say anything it could be used as evidence." My initial concern therefore is whether these warnings satisfy Article 31(b) and *Miranda v. Arizona, supra*. If not, there is no need for further review on the first granted issue.

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[2] *See United States v. Bagaric*, 706 F.2d 42, 69 (2d Cir. 1983); *United States v. Heller*, 625 F.2d 594, 599-600 (5th Cir. 1980); *United States v. Molina-Chacon*, 627 F.Supp. 1253, 1262-63 (E.D.N.Y. 1986). *See also United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1224-25 (9th Cir. 1988).

Mil.R.Evid. 304(c) delineates the rights advice required by Article 31.[3] It states:

> (c) Warnings concerning the accusation, right to remain silent, and use of statements. A person subject to the code who is required to give warning under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:
>
> (1) informing the accused or suspect of the nature of the accusation;
>
> (2) advising the accused or suspect that the accused or suspect has the right to remain silent; and
>
> (3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

Moreover, Mil.R.Evid. 304(d) delineates the rights advice required by *Miranda v. Arizona, supra*: [4]

> (d) Counsel rights and warnings.

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[3] Article 31(b), UCMJ, 10 USC § 831(b) provides:

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

The right to counsel is "[a]ncillary to Article 31" and the accused must be warned of that right prior to interrogation. *United States v. Moreno*, 36 MJ 107, 113 (CMA 1992) (relying on Mil.R.Evid. 305(d), Manual for Courts-Martial, United States, 1984).

[4] In *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the Supreme Court imposed the following requirements:

> Prior to any questioning, the person must be warned that he had a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

> (1) General rule. When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, *an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation*. . . .

(Emphasis added.) Clearly these warnings requirements were not satisfied in appellant's case. *See United States v. Jones,* 6 MJ 226, 227 (CMA 1979); *cf. United States v. Kline,* 35 MJ 329, 336 (CMA 1992).

III

Need for Warnings

My next concern then is whether the Military Rules of Evidence required sufficient warnings be shown before appellant's confession could be admitted at his courtmartial. Appellant has not suggested that all confessions taken by foreign police must be preceded by Article 31 warnings or *Miranda* warnings before they are admissible at courts-martial. Instead, I note that Mil.R.Evid. 305 (h)(2) limits such a foundational requirement to cases where American military has *instigated,* [conducted] *or participated in* the foreign interrogation. *See also United States v. Jones, supra* at 228-29 (instrumentality test). *See United States v. Oakley, supra* at 32. *See also United States v. Covington, supra* (agency and joint venture test). I will review a factfinders' determinations on these questions under a clearly erroneous standard of review. *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir. 1992); *United States v. Rosenthal,* 793 F.2d 1214, 1231 (11th Cir. 1986); *cf. Lau v. United States,* 778 F.Supp. 98, 100-01

(D.R.I. 1991) (Dist. Ct. Standard). *See generally* S. Childress and M. Davis, *Federal Standards of Review* § 10.04 at 10-14 to 10-15 (2d ed. 1986) (reversal of trial judge's factual findings permitted, even those supported by substantial evidence, if record as whole leaves the court with a definite and firm conviction that a mistake was made below); § 11:13 (appears to be a mixed question of law subject to independent review with some deference to factfinder).

This Court has characterized the instigation question as one asking whether the foreign police were in fact an instrument of the military used to evade Article 31 or the *Miranda* requirements. *See, e.g., United States v. Swift,* 17 USCMA 227, 38 CMR 25 (1967); *United States v. Plante,* 13 USCMA 266, 32 CMR 266 (1962); *United States v. Grisham,* 4 USCMA 694, 16 CMR 268 (1954); *all cited with approval in United States v. Jones, supra.* In these cases, this Court looked at the reasons for and the methods of the foreign investigation. In determining the participation question, we have looked at the degree of involvement of American military personnel in the interrogation.

In *United States v. Grisham,* this Court stated that the "yardstick" for imposing Article 31(b) warnings requirements is when foreign authorities "conduct an interrogation or request a statement in furtherance of any military investigation, or *in any sense as an instrument of the military.*" 4 USCMA at 697, 16 CMR at 271 (emphasis added). This "instrumentality test" was adopted in the context of an independently-initiated investigation by French police. Grisham had summoned both French civilian and American military police to his residence after killing his wife. The French police immediately "took charge of the investigation" and requested an interpreter from the Army. Accordingly, we concluded that the French police were not acting in furtherance of a military

investigation. The Court also specifically noted that "[t]he American functionary present [during the initial interrogation of Grisham] propounded no questions, nor did he seek to dictate the route taken during the interrogation." *Id.* at 698, 16 CMR at 272. Thus, we also concluded that the military police did not participate in the actual interrogation.

In *United States v. Plante, supra,* the French police were conducting an investigation of black-market operations by a member of the American military in France. This Court concluded that the French authorities were not "acting as the instrument of the American military authorities." 13 USCMA at 271, 32 CMR at 271 (citing *United States v. Grisham, supra*). Furthermore, upon delivering Plante to the French police headquarters, two U.S. military investigators remained present during the interrogation by the French police. The record however further supported the conclusion that "[n]either [U.S. military investigator] who was present *took any part* in the questioning by French authorities, and it is denied that the French were used as a conduit through which to pose questions they suggested." *Id.* at 269, 32 CMR at 269 (emphasis added).

In *United States v. Swift, supra,* German civilian police found the dead body of a German national in a hotel room in Frankfurt, Germany. An "[i]nvestigation by German police led to the accused, who was in Germany on temporary duty and had registered at the hotel." 17 USCMA at 229, 38 CMR at 27. An interview of appellant by German police was conducted off "base in [the] custody of the German police[,]" *id.* at 230, 38 CMR at 28, to determine whether "to continue German control over the accused or to relinquish it to the American authorities[,]" *id.* at 232, 38 CMR at 30. This Court concluded, as a matter of law, "that the two investigations" did not "merge[]into an indivisible entity." Moreover, the

Court found that there were no U.S. military officials present in the room while "any significant remark was made by the accused." *Id.* at 232, 38 CMR at 30.

In *United States v. Jones,* 6 MJ 226, this Court held that "the mere presence" of military personnel at the interrogation was insufficient to invoke Art. 31(b) warning requirements under the "instrumentality" test. It recognized, however, "that persons subject to the Code could not evade the requirements of . . . Article [31(b)] by utilizing 'the services of a person not subject to the Code as *an instrument* for eliciting disclosures without warning.'" *Id.* at 228 (emphasis added) (quoting *United States v. Grisham,* 4 USCMA at 696, 16 CMR at 270). Moreover the Court also considered the participation in the interrogation question and hypothetically applied *"a direct producing cause"* test to determining whether a showing of a proper rights advisement under *Miranda* was required before the statement could be admitted at courts-martial. Such a standard satisfies the more-than-"innocuous" and "relatively inconsequential" language found in *United States v. Oakley,* 33 MJ at 32, as well as beyond the "mere presence" standard of our earlier cases.

I recognize that mere presence of American military authorities at the interrogation of their conduct as an interpreter does not constitute sufficient participation to require proof of the warnings. *See United States v. Jones, supra.* Mil.R.Evid. 305(h)(2) similarly states:

> (2) Foreign interrogations. Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents *unless such interrogation is conducted, instigated, or participated in by military personnel* or their agents or by those officials or agents listed in subdivision (h)(1). A statement

> obtained during such an interrogation is involuntary within the meaning of Mil.R.Evid. 304(b)(3) if it is obtained through the use of coercion, unlawful influence, or unlawful inducement. *An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (h)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.*

(Emphasis added.) Nevertheless, our cases also suggest that any affirmative conduct by military police toward a servicemember during a foreign interrogation is a critical factor to be considered on the question of participation. *Cf. United States v. Oakley, supra.*

IV

Application

Turning to appellant's case, I first note that his investigation was to the very least a joint operation between British Police authorities and American military personnel. *See United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1227-28 (9th Cir. 1988). Admittedly "the furnishing of information which results in the interrogation of an accused by foreign police agents is insufficient action to require *Miranda* [*v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] warnings." *United States v. Morrison,* 12 MJ 272, 277 (CMA 1982) (quoting *United States v. Jones, supra* at 229). Likewise, merely making the appellant available to the foreign authorities is insufficient involvement to invoke rights-warnings requirements. *See United States v. Jones, supra* at 230. However, the initiation of this investigation by American

military police, the extensive coordination and reporting between the two police agencies in this case, and the substantial efforts made by American military police in assisting this investigation exceeded the relatively passive role contemplated by our case law. This clearly constituted instigation within the meaning of Mil.R.Evid. 305(h)(2). *Cf. United States v. Murphy,* 18 MJ 220, 223 (CMA 1984); *United States v. Bell,* 7 MJ 108, 110 (CMA 1979); *United States v. Holder,* 10 USCMA 448, 451-52, 28 CMR 14 (CMA 1959).

Turning to appellant's actual interrogation, it is undisputed that military personnel did speak and act during appellant's custodial questioning by British police. Moreover such conduct cannot reasonably be said to be innocuous or inconsequential under the circumstances of this case. *Cf. United States v. Oakley, supra.* During the interview, SA Sterne admonished appellant to stop his lying, a common interrogation ploy. *See* Inbau, Reid, and Buckley, *Criminal Interrogation and Confession* 126-27, 142-153, 312 (3d ed. 1986). *See generally United States v. Leiker,* 37 MJ 418 (CMA 1993). Additionally, MSgt Keister made a nonverbal gesture to appellant just prior to his confession, *i.e.* nodding his head to demonstrate to appellant that he agreed with Detective Scotney that it would be easier if appellant cooperated. Ibau, Reid, and Buckley at 314-18. Finally, the record shows that although appellant was initially reluctant to admit involvement with drugs he confessed immediately after this prompting. *Cf. United States v. Oakley, supra* at 32; *United States v. Ravine,* 11 MJ 325, 330 (CMA 1981). In light of this Court's past cases, I conclude that the opinion of the Court of Military Review equating these factual circumstances to mere presence, not participation, was clearly erroneous.[5] *See generally United States v.*

[5] The judge found as fact that there was a verbal admonishment by the OSI agent during the interrogation by British Police. Yet

Travers, 25 MJ 61, 62 (CMA 1987); *United States v. Schake,* 30 MJ 314, 318 (CMA 1990).

Therefore, I would reverse the decision of the United States Air Force Court of Military Review.[6]

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he concluded that there was insufficient participation without reconciling this undisputed fact. To the extent that this holding implies that admonishments by military authorities falling short of questions can be ignored regardless of the circumstances, I also find legal error. *See United States v. Oakley,* 33 MJ 27, 32 (CMA 1991).

[6] Likewise, in view of my handling of Issue I in favor of appellant, I do not reach the issue whether AFOSI personnel "participated in" the search of appellant's residence for the purposes of Mil.R.Evid. 311(c).

APPENDIX K

Relevant portions of the Uniform Code of Military Justice (UCMJ)

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent inspection in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense

counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his

designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the

conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must

be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law *and fact* and determines, on the basis of the entire record, should be approved. In considering the record, it may *weigh the evidence, judge the credibility of witnesses,* and *determine controverted questions of fact*, recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

APPENDIX L

Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-marital; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

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